(22,262)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 105.

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, PLAINTIFF IN ERROR,

vs.

HENDERSON ELEVATOR COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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a THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in Frankfort, on Dates Hereinafter Mentioned.

b Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
HENDERSON ELEVATOR COMPANY, Appellee.

Statement.

The Illinois Central Railroad Company is the Appellant.
The Henderson Elevator Company is the Appellee.
The judgment appealed from was rendered by the Henderson Circuit Court on the 27th day of May, 1909, being the 22nd day of the May 1909 term of that Court, and is found on pp. 24 and 25 of the Record; and the judgment overruling the motion for a new trial was rendered on the 4th day of June, 1909, being the 29th day of May, 1909 term of the Henderson Circuit Court and is found on p. 27 of the Transcript.
Appeal was granted by the Circuit Court, and no summons, warning order, or other process is desired.

TRABUE, DOOLAN & COX,
Attorneys for Appellant.

c Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
HENDERSON ELEVATOR COMPANY, Appellee.

Amended Statement or Endorsement of Record.

Counsel for Appellant are Trabue, Doolan & Cox, Louisville, Kentucky.
Counsel for Appellee are Clay & Clay, Henderson, Kentucky.
The address of appellee is Henderson, Kentucky.

DORSEY AND WORSHAM AND
TRABUE, DOOLAN & COX.
Counsel for Appellee.

1 STATE OF KENTUCKY,
County of Henderson:

Henderson Circuit Court, May Term, 1909, Thursday, May 27th, 1909.

Pleas Before Hon. J. W. Henson, Judge.

HENDERSON ELEVATOR COMPANY, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Transcript.

Style of Suit.

Be it remembered: That on November 13th 1909 defendant in the above styled case filed in the office of the Clerk of Henderson Circuit Court its schedule for the purpose of an appeal to the Court of Appeals. Said schedule is here copied:

Schedule.

The Clerk is directed to copy for the transcript for an appeal all of the record in this case except the summonses and subpœnas, and transcript of evidence.

LOCKETT & WORSHAM,
Attorneys for Defendant.

Service of the above is hereby accepted.

CLAY & CLAY,
Attorneys for Plaintiff.

On April 22nd, 1908 the plaintiff filed in the office of the Clerk of Henderson Circuit Court its original petition herein: Said petition is here copied:

2 HENDERSON ELEVATOR COMPANY, Plaintiff,
vs
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Petition.

The plaintiff states that it is a corporation created, organized and doing business under the laws of the State of Kentucky, and is engaged in the business of buying, handling and shipping grain. That the defendant, the Illinois Central Railroad Co., is a corporation created, organized and doing business under the laws of the State of Illinois, and operating a line of railroad through the states of Illinois, Indiana and Kentucky, and thence south to and

through the City of New Orleans, La., passing through the City and County of Henderson, Kentucky, and that it is a common carrier of freight and passengers for hire, and is engaged in interstate commerce.

The plaintiff states that on the 20th day of August, 1906, the defendant issued its tariff of rates on corn shipped from Indiana and Illinois stations, through Henderson, Kentucky, to New Orleans, La. for export, and also its tariff of rates from points in Indiana and Illinois to Henderson, Kentucky, and thence reconsigned from Henderson, Kentucky, to New Orleans, La. for export, and prescribing
3 a rate of twelve (12) cent- per one hundred (100) pounds from stations in Indiana and Illinois to New Orleans, La. for export. Said tariff went into effect on the 1st day of September, 1906. Subsequently the defendant issued a supplement to said tariff, reducing said tariff on corn shipped from stations in Indiana and Illinois for export from twelve (12) cents per one hundred pounds to ten (10) cents per one hundred pounds, which last named tariff went into effect on the 6th day of September, 1906. Under both of said tariffs, it was provided that the through rate to be applied from the Indiana and Illinois stations to New Orleans, La. for export would be ten (10) cents per hundred pounds, and that shipments to New Orleans would be billed at the through rate from said points to Henderson, Ky., and when reconsigned at Henderson, Ky., to New Orleans for export would be way-billed from Henderson, Ky. at the difference between the through rate of ten (10) cents per hundred pounds to New Orleans, and the rates *and the rates* shown to Henderson, Ky., in other words,—the plaintiff and all shippers at Henderson, Ky., were authorized and permitted to ship corn from any station in Indiana and Illinois shown on said tariff to Henderson, Ky., pay the local freight from said points to Henderson, Ky., and if reconsigned from Henderson, Ky. to New Orleans, La. for export within one hundred and eighty (180) days after its receipt at Henderson, Ky., then they were given the
4 benefit of the through rate of ten (10) cents per hundred pounds from said points in Indiana and Illinois through to New Orleans, La. for export. Copies of the tariff above mentioned were furnished this plaintiff by the defendant, and copies of the same were posted in the freight depot of the defendant in the City of Henderson, Ky., as required by the act of Congress regulating commerce. Said schedules are numbered Interstate Commerce Commission No. "A" 5669 and Illinois Central Railroad Tariff "C" 31604, and a copy of same is filed herewith as part hereof marked "A". The second tariff mentioned above is supplement No. 2 to Interstate Commerce Commission No. 5669, and supplement No. 2 to Illinois Central Railroad Tariff No. "C" 13604, and a copy of said last named tariff, or supplement, is filed herewith as part hereof marked "B".

The plaintiff states that it never had any notice or knowledge that the tariff of rates on corn shipped from said points in Indiana and Illinois to New Orleans, La. for export for reconsignment at Henderson, Ky. had been changed, nor was any notice of any change in such tariff sent to the agent of the defendant company in the City

of Henderson, Ky., or posted in the depot, office, or other place at Henderson, Ky., as required by law, until the 19th day of September 1907.

Now, plaintiff states that on or about the first day of Sep-
5 tember, 1907, it had purchased at various points in Indiana and Illinois and was negotiating for the sale and shipment from said points to New Orleans, La. for export, to be shipped to Henderson, Ky. and reconsigned for New Orleans, one hundred thousand (100,000) bushels of corn, and that upon investigation it found the tariffs above mentioned, the last of which established a rate of ten cents per one hundred pounds on such shipments from said points in Indiana and Illinois. It states that it took such schedules of tariff to the freight office of the defendant in the city of Henderson, Kentucky, that place being its principal office and place of business, and the place from which its shipments were made and its freight rates obtained, on the 6th day of September, 1907, and inquired of the agent of the defendant company in the City of Henderson, Ky. if said tariff had been superseded or changed in any manner and whether or not same was in full force and effect. The said agent made a careful examination of his files and reported to the plaintiff that he had nothing in his office changing or modifying the above mentioned rate; the plaintiff and the defendant's said agent both examined the office of the defendant in the City of Henderson, Ky., and made a close and careful search of the office and place of business of the defendant in said city, and could
6 find no tariff or schedule posted therein, or contained therein at all, or in any other place, changing such rate; and the plaintiff alleges and charges that no schedule or tariff changing the rate aforesaid had at that time been furnished the agent of the defendant at Henderson, Ky., or posted in any public place, or in any place, in any depot, station, or office of the defendant in the City of Henderson, Ky. Notwithstanding all this the plaintiff requested the agent of the defendant company to make inquiry of the proper authorities of his company, and report to this plaintiff whether or not the above mentioned tariffs were at that time in full force and effect and whether or not any change had been made therein, which said agent agreed and promised to do; whereupon said agent wrote to the proper authorities on the 6th day of September, 1907, to know if any change had been made in the freight rates aforesaid, and the commerce agent of the defendant located in the City of Evansville, Ind., on the 9th day of September, 1907, wrote the defendant's agent at Henderson, Ky., that the rate on such shipments was ten cents per one hundred pounds, and that no change had been made in tariff "C" 13694 above mentioned, other than as stated above. The defendant's agent at Henderson, Ky. furnished a copy of such letter to this plaintiff and again notified this plaintiff that the rate on such shipments was ten cents per one hundred pounds.

7 Now, the plaintiff states that subsequently, to-wit:—on the 13th day of September, 1907, it closed a contract with the Hall Baker Grain Co. of New Orleans, for the sale and shipment of one hundred thousand bushels of corn from various points in In-

diana and Illinois to New Orleans, La., for export, to be shipped to Henderson, Ky., and there reconsigned to New Orleans, La., as provided for under the terms of said schedule above filed, and that such sale was made upon the basis of a freight rate of ten cents per one hundred pounds, as provided in the schedule above mentioned; and plaintiff states that under the terms of said sale, it was required to, and did pay the freight on said corn from said points in Indiana and Illinois to New Orleans, La. Upon closing said trade, it reported same to the defendant's agent at Henderson, Ky., and the defendant booked said trade and agreed to transport said corn aforesaid at the rate of ten cents per one hundred pounds from points in Indiana and Illinois, through Henderson, Ky., to New Orleans, La. for export.

The plaintiff states that after said trade had been made and after it had obligated itself to ship said one Hundred thousand (100,000) bushels of corn, to-wit:—On September 19, 1907, it received a notice from the defendant company, dated September 17,
8 1907, that the tariff on such shipments had been increased from ten (10) cents per one hundred pounds to thirteen and one half (13½) cents per one hundred pounds, and that such increase had been made under a schedule issued Feb. 28, 1907, and which went into effect April 1, 1907, and notwithstanding the plaintiff had sold said corn on the basis of a freight rate of ten (10) cents per one hundred pounds, the defendants required this plaintiff to pay on said shipments a rate of thirteen and one-half (13½) cents per one hundred pounds, a difference on said shipment of one thousand nine hundred and sixty ($1,960.00) dollars.

The plaintiff states that it would not have made the sale of said one hundred thousand (100,000) bushels of corn at the price it did make it, if it had known said tariff rate had been increased, but would have made the same for one thousand nine hundred and sixty ($1,960.00) dollars more, and its loss on that account amounted to said sum of one thousand nine hundred and sixty ($1,960.00) dollars. It states that its said loss was through no fault of this plaintiff, but was due solely and only to the negligence of the defendant, its agents and servants, in failing to file with its local agent, or to post in its depot, station or office in the City of Henderson, or at any other place in said city, where freight was received for transportation, any printed copy of copies of its said
9 schedule of rates changing its prior schedule furnished this plaintiff, and in failing to give its local agent any notice or information that said rate had been changed. By reason of such negligence of the defendant, its agents and servants, the plaintiff has been damaged in the sum of one thousand nine hundred and sixty ($1,960.00) dollars.

Wherefore the plaintiff prays judgment against the defendant for the sum of one thousand nine hundred and sixty ($1,960.00) dollars it prays for its costs herein and for all proper relief.

CLAY & CLAY,
Attorneys for Plaintiff.

The Copies of the Tariff referred to above are here copied:—

10 Interstate Commerce Commission No. A-5669. Cancels I. C. C. No. A-5354.

I. C. R. R. Tariff No. C-13604. Cancels Tariff = B-13604.

Illinois Central Railroad Company.

Freight Tariff on Corn, C. L., to New Orleans, La., for Export to European Ports.

From—		Rates in cts. per 100 lbs. To— Evansville, Ind.	Henderson, Ky.
Lerna	Ill.	..	..
Janesville	"	..	..
Bradsbury	"	..	..
Toledo	"	..	..
Norviel	"	..	..
Greenup	"	9	10
*Greenup Hill	"	..	..
Hidalgo	"	..	..
Rose Hill	"	..	..
Falmouth	"	..	..
Newton	"	..	..
Boos	"	..	..
*Becks	"	..	..
West Liberty	"	..	..
Dundas	"	8	9
Olney	"	..	..
*Quarry	"	..	..
Calhoun	Ill.	..	..
Parkersburg	"	..	..
West Salem	"	8	9
Bone Gap	"	..	..
Browns	"	7	8
*Siegert	"	..	..
Grayville	"	..	..
*Hovey	Ind.	..	..
Griffin	"	..	..
*Barrett	"	..	..
Stewartsville	"	5	6
New Harmony	"	..	..
Poseyville	"	..	..
*Wendel	"	..	..
Martin	"	..	5
Armstrong	"	..	4½

*No agent. Freight must be prepaid.

11 The through rate to be applied from the above station to New Orleans, (For export) will be .12c per 100 lbs. Shipments will be billed to New Orleans, at the through rate, or to Evansville, Ind., or Henderson, Ky., at the rate shown above, and when reconsigned to New Orleans (for export) will be way-billed from Evansville, Ind., or Henderson, Ky., at the difference between the through rate or 12 cents per 100 lbs. to New Orleans, La., and the rates shown above to Evansville, Ind., and Henderson, Ky.,

The above arrangement for reconsigning will apply when Corn is reshipped from Evansville, Ind., or Henderson, Ky., within 180 days after arrival at these points and only when original paid freight bills covering the movement into Evansville, Ind., or Henderson, Ky., are surrendered.

NOTE.—In addition to the rate shown herein the Central Elevator & Warehouse Company will charge one and eight-tenths (1.8) ct per 100 lbs. for handling the grain from the cars into the Elevator thence into the vessels at N. O. La.

Issued August 20, 1906. Taking Effect Sept. 1, 1906.

W. E. Keepers, G. F. A. Chicago, Ill.
R. C. Perkins,
T. J. Hudson,

C. C. Cameron, G. F. A. Memphis, *Ky.*,
D. W. Longstreet,
F. B. Bowes.
Supplement No. 2 to L. C. C. No. A-5669. Cancels Supplement No. 1.
Supplement No. 2 to I. C. R. R. Tariff No. C-13604 Cancels Supplement No. 1.

Form 1175.

Illinois Central Railroad Company.

Supplement to Freight Tariff on Corn, C. L., from Stations in Illinois and Indiana to New Orleans, La., for Export to European Ports.

Substitute the following for note shown in Tariff:—

Exhibit.

The through rate to be applied from the above stations to New Orleans, La., (for export) will be ten cents per 100 lbs.
Shipment will be billed to New Orleans, at the through rate or to Evansville, Ind., or Henderson, Ky., at the rate shown above, and when re-consigned to New Orleans, (for export), will
12 be way billed from Evansville, Ind., or Henderson, Ky., at the difference between the through rate of ten cents per 100 lbs. to New Orleans, La., and the rates shown above to Evansville, Ind., and Henderson, Ky.,
The above arrangement for reconsigning will apply when corn is reshipped from Evansville, Ind., or Henderson, Ky., within 180 days after arrival at these points, and only when original paid freight bills covering the movement into Evansville, Ind., or Henderson, Ky., are surrendered.
NOTE.—In addition to the rate shown herein the Central Elevator & Warehouse Company will charge one (1) cent per 100 lbs for handling the grain from the cars in the elevator and then into the vessels at New Orleans, La.,
Effective September 6, 1906.
W. E. Keepers, G. F. A. Chicago, Ill.
R. C. Perkins, G. F. A. New Orleans, La.,
T. J. Hudson, G. T. M. Chicago, Ill.
C. C. Cameron, G. E. A. Memphis, Tenn.,
D. W. Longstreet, G. F. A. Louisville, Ky.,
F. B. Bowes, F. T. M. Chicago, Ill.,
A. L.
(Filed Gr-659-3339).
9—7—'06—125.

On Monday May 4th, 1908 being 1st day of May 1908 term of Henderson Circuit Court the following order was entered herein:—

Order.

Came defendant by attorney and filed a general demurrer to plaintiff's petition. Ordered that this case be set for trial on the 26th day of the present term.

The demurrer referred to above is here copied:—

13 *Demurrer.*

Defendant demurs to plaintiff's petition because it does not state facts sufficient to constitute nor support a cause of action.

LOCKETT & WORSHAM.
Attorneys for Defendant.

On Thursday Feby. 18th 1909 being 40th day of Jany 1909 term of Henderson Circuit Court the following order was entered herein:—

Order.

Coming on to be heard on the defendants' demurrer to the plaintiff's petition and the court being advised overrules the same, to which ruling of the court the defendant objects and excepts. Ordered that the defendant be and is given until the 45th day of the term in which to file its answer.

On Friday Feby. 26th, 1909 being 47th day of Jany 1909 term of Henderson Circuit Court the following order was entered herein:—

Order.

Came the parties by attorney. The defendant moves the court to require the plaintiff to make more specific his petition, first, by setting out the points of shipment; second, to whom the corn was sold.

Then coming on to be heard on the said motion, and the
14 court considering same, overrules part first of said motion, the defendant objecting and excepting and sustains part second of same, plaintiff objecting and excepting. It is ordered that plaintiff be and is given leave to so interline its petition, and defendant appeared and filed its answer herein.

The answer referred to above is here copied:—

Answer.

The defendant states that the plaintiff seeks in this action to recover of the defendant the sum of $1,960.00 in damages, for the alleged neglect of the defendant company to keep posted on file for public inspection, in its freight office, in the City of Henderson, Kentucky, a schedule of the rates plaintiff charged for the carriage of corn shipped from points in Illinois and Indiana, through the City of Henderson, Kentucky, to New Orleans, Louisiana, at the date of a certain sale alleged by plaintiff to have been made by it to parties to

whom the corn was to be delivered in New Orleans, Louisiana. The plaintiff alleges in his petition that the defendant, under the Act of Congress of the United States, known as the act to regulate commerce, was required to keep such schedule of the rates in force in the freight office in Henderson, Kentucky, and that relying upon the defendant obeying said Act of Congress, plaintiff sold 100,000 bushels of corn, to be delivered in New Orleans, Louisiana, upon the basis of an obsolete*ly* schedule, fixing the rate at ten cents for each 100 pounds, which was not in force, and he was forced to pay 13½ cents per 100 pounds for the carriage of said corn by the rate in force or 3½ cents per 100 pounds more than it would have had to pay by the obsolete rate and which failure to keep the existing schedule in said office, occasioned plaintiff a loss of $1,960.00. Plaintiff seeks the recovery of that sum under section 8 of said act which provides that any carrier subject to the provisions of this Act shall be liable to the party aggrieved for all damages suffered by the violation of any of the provisions of said act by such carrier.

The defendant says that prior to the passage of said Act of Congress, no schedule of freight rates was required to be posted on file in the office of defendant on Common Carriers in general, and said Act in the following section No. 9 provides that any one aggrieved by the violation of any of its provisions may apply to the Interstate Commerce Commission for relief or sue in any District or Circuit Court for the recovery of any damages suffered by the failure of such carrier to comply with the requirements of said Act.

The defendant says that no jurisdiction is conferred by said Act of Congress, upon State courts to enforce its provisions or recover damages for neglecting to observe them, and defendant here denies that this court has jurisdiction to hear and determine the controversy between the parties hereto, and prays that the petition of plaintiff be dismissed for want of jurisdiction of this court over the subject matter of this action.

No. 2. Further answering the defendant denies any knowledge or information sufficient to form a belief that plaintiff never had any notice or knowledge that the tariff of rates on corn shipped from said points in Indiana or Illinois to New Orleans, Louisiana, for export for re-consignment at Henderson, Kentucky, had been changed until the 19th day of September 1907; and denies such knowledge or information that the plaintiff had purchased at various points, or any points in Indiana or Illinois, or was negotiating for the sale and shipment from said points to New Orleans, Louisiana, for export, to be shipped to Henderson, Kentucky, and reconsigned for New Orleans 100,000 bushels, or any quantity of corn, or that upon investigation plaintiff found the tariffs mentioned in his petition, the last of which established a rate of ten cents per 100 pounds on such shipments from said points in Indiana and Illinois; and denies such knowledge or information that plaintiff took such tariffs (being the tariffs set forth in the petition) to the freight office of defendant in Henderson, Kentucky, on the 6th day of September 1907 and inquired of defendant's agent in Henderson, Ken-

tucky, if said tariff had been superseded or changed or was in full force and effect. Defendant denies that its office in Henderson, Kentucky, is its principal office and place of business, or the place from which its shipments were made and its freight rates obtained.

Defendant has no knowledge or information sufficient to form a belief that said agent made an examination of his files or reported to plaintiff that he had nothing in his office changing or modifying the rate stated by plaintiff, or that plaintiff and defendant's agent both examined defendant's office in Henderson, Kentucky, or made a close and careful search of the office and place of business of defendant in said City and could find no tariff or schedule posted or contained therein, or in any other place changing such rate, or that no traiff or schedule changing the aforesaid rate had then been furnished the agent of Defendant at Henderson, Kentucky, or posted in any depot station, or office of the defendant in the City of Henderson, Kentucky, nor that notwithstanding all this plaintiff requested defendant's agent to make inquiry of the proper authorities
18 of his company and report to plaintiff whether the above tariffs were in force, or whether any change had been made therein, or that said agent wrote to the proper authorities at any time to know if any change had been made in the rates aforesaid, or that the commerce agent of defendant at Evansville, Indiana, wrote defendant's agent at Henderson, Kentucky, that the rate of said shipments was ten cents per 100 pounds and that no change had been made in tariff "C" 13604, other than as stated by plaintiff, or that plaintiff was furnished a copy of such letter by defendant's agent at Henderson, Kentucky, or notified plaintiff that the rate on such shipment was ten cents per 100 pounds.

The defendant has no knowledge nor sufficient information to form a belief that plaintiff subsequently, on September 13th, 1907, or at any other time closed a contract for the sale and shipment of 100,000 bushels of corn from various points in Indiana and Illinois to New Orleans, Louisiana, for export to be shipped to Henderson, Kentucky, and there reconsigned to New Orleans, Louisiana, as provided for in the schedules filed with the petition or that such sale (if there was any) was made upon the basis of a freight rate of ten cents per 100 pounds as provided for in said schedule,
19 or that under the terms of sale plaintiff was required to, or did, pay the freight on said corn from said points in Indiana and Illinois to New Orleans, Louisiana, or that plaintiff reported said trade to Defendant's agent at Henderson, Kentucky, and denies that defendant booked the trade or agreed to transport said corn at the rate of ten cents per 100 pounds, from points in Indiana and Illinois to New Orleans, Louisiana, for export.

Defendant has no knowledge nor sufficient information *or* form a belief that after plaintiff had obligated itself to ship 100,000 bushels of corn on September 19th, 1907, it received notice dated September 17th, 1907, that the tariff in such shipments had been raised to 13½ cents per 100 pounds under a tariff that went into effect April 1st, 1907; but defendant says that it charged plaintiff the rate fixed by its schedule then in force, no matter what it was

and that it would have been guilty of a high misdemeanor to have charged any less or greater rate. It has no knowledge or information sufficient to form a belief that plaintiff was required by defendant to pay a difference of $1,960.00 on any shipment of corn in consequence of a change in the freight rates, nor that plaintiff would not have made the sale at the price it did, if it had known said tariff rate had been increased or would have made it for $1,960.00
20 more, or that its loss on that account amounted to any sum whatever, or that said loss (if any there was) was due to the negligence of defendant, its agents and servants in failing to file with its local agent or post in its depot station or office in Henderson, or any other place in Henderson, any printed copy of said schedule changing its prior schedule or in failing to give its local agent information that by reason of such negligence plaintiff has been damaged in any sum.

No. 3. The defendant further states that the plaintiff was guilty of negligence in the matter in which it charges defendant with negligence and sues for the alleged damage resulting therefrom, which contributed to his injury, if any, he has sustained to that extent that but for said negligence on plaintiff's part, no loss or damage by reason of any negligence of the defendant would have been suffered by the plaintiff.

Wherefore defendant prays to be dismissed with judgment, its costs and for all proper relief.

LOCKETT & WORSHAM,
Att'ys for Def't.

TRABUE, DOOLAN & COX,
Of Counsel.

21 On Monday May 3rd 1909 being 1st day of May 1909 term of Henderson Circuit Court the following order was entered herein:

Order.

Ordered that this case be set for trial on the 21st day of the term.

On Saturday May 22nd 1909 being 17th day of May 1909 term of Henderson Circuit Court the following order was entered herein:

Came plaintiff by attorney and filed a demurrer to 1st paragraph of defendant's answer and without waiving said demurrer filed a reply to 2nd paragraph of defendant's answer.

Notice.

The defendant, the Illinois Central Railroad Co., is hereby notified to produce and have present on the trial of this case the following letters:

A letter dated Evansville Sept., 9, 1907, addressed to Mr. G. H. Waltz, Agt., Henderson, Ky., and signed J. B. Convery, Commercial Agent, in which letter appears among other things the following paragraph.

"The present rate on corn, car load, from Henderson, Ky., to New Orleans for *express*, except Cuba, is 10¢, mini-um capacity of car."

22 Also letter dated Sept. 19, 1907, written and signed by the Henderson Elevator Co., and addressed to C. C. Cameron, Gen. Frt. Agt. I. C. R. R., Chicago, Ill., relating to, "Error in rate quotation."

Also a letter dated Sept. 6, 1907, written by G. H. Waltz to J. B. Convery, Commercial Agent, or someone else in the office of the commercial agent, to which letter of Sept. 9th above mentioned is a reply.

Also a letter written by G. H. Waltz to the Illinois Central Railroad Co. on about Sept. 13th, advising the Company of the sale made by the Henderson Elevator Co. of the 100,000 bu. of corn.

CLAY & CLAY,
Attorneys for Plaintiff.

Service of above notice is accepted. May 22nd, 1909.
LOCKETT & WORSHAM,
Att'ys. as if Served upon G. H. Waltz,
Agt. of Def't at this Place.

Demurrer & Reply.

The plaintiffs demurs to the first paragraph of the answer of the defendant because it does not state facts sufficient to constitute a defense to the plaintiff's cause of action.

Without waiving said demurrer plaintiff denies that no jurisdiction is conferred by said act of Congress upon states and Counties to enforce its provisions, or recover damages for neglect to

23 observe them.

For further reply the plaintiff states that it is not true, and it denies that the defendant charged the plaintiff the rate fixed by its schedule then in force, or that it would have been guilty of a high misdemeanor to have charged any less or greater rate.

The plaintiff denies that it was guilty of negligence in the matter in which it charges the defendant of negligence, or that it sues for the alleged damages resulting therefrom which contributed to its injury, or that but for negligence on its part no loss or damage by reason of the negligence of the defendant would have been suffered by the plaintiff.

Wherefore plaintiff prays as in its original petition.

CLAY & CLAY,
Attorneys for Plaintiff.

On Wednesday May 26th 1909 being 21st day of May 1909 term of Henderson Circuit Court the following order was entered herein:

Order.

This cause coming on to be heard on plaintiff's demurrer to first paragraph of defendant's answer and the court being advised sustains said demurrer to which ruling of court the de-
24 fendant objects and excepts. Parties appeared by attorney, announcing ready for trial, came the following Jurors, to-wit: Gus Starr, J. H. Funston, J. H. Nelson, G. W. Ragon, M. Y. Nunn, J. K. Wilson, R. H. Kelly, David Hart, T. W. Hall, Orville Collins, T. J. Eblin, and C. T. Blackwell, all of whom were sworn according to law and trial of case proceeded with. On motion of defendant and by agreement of plaintiff Miss Augusta Fitz Gibbon was called and proceeded to take a stenographic report of the evidence herein. At Five o'clock not having time to complete the trial the jury was admonished by court as by law required allowed to disperse and directed to be in court tomorrow morning at Nine o'clock to which time this case is continued.

On Thursday May 27th, 1909 being 22nd day of May 1909 term of Henderson Circuit Court the following order was entered herein:

Judgment

Parties appeared by attorney, the Jury heretofore empaneled appeared were called and trial of case proceeded with. Having heard the evidence received instructions of court and heard argu-
25 ment of counsel, the Jury retired to their room and presently returned into court the following verdict, viz: We the Jury find for the plaintiff in the sum of Nineteen hundred and sixty dollars, May 27th, 1909 Gus Starr Foreman. Wherefore, it is adjudged by the court that the plaintiff Henderson Elevator Co. recover of Illinois Central Railroad Co. the sum of Nineteen hundred and sixty dollars with six per cent interest from May 27, 1909 until paid and its costs herein expended for all of which it may have execution.

On Saturday May 29th 1909 being 24th day of May 1909 term of Henderson Circuit Court the following order was entered herein:

Order.

Came defendant by attorney and moved the court to render judgment dismissing plaintiff's petition and give it judgment for its costs notwithstanding the verdict entered herein. The court being advised overrules said motion to which ruling of the court the defendant object- and except-. The defendant then moved the court to set aside verdict, arrest the Judgment entered herein and grant it a new trial and filed written reasons therefor. Said motion is continued for the present.

Motion for judgment notwithstanding the verdict is here
26 Copied:

The defendant the Illinois Central Railway Company moves the court to render Judgment dismissing the petition and for defendant's costs, notwithstanding the verdict.

LOCKETT & WORSHAM.
Att'ys for Def't.

Motion for a New Trial referred to above is here copied:

Motion for New Trial.

The defendant moves that the verdict herein be set aside and a new trial granted defendant, because:

1. The court erred in overruling the demurrer to the petition.
2. Also in sustaining a demurrer to the first paragraph of defendant's answer.
3. In admitting and regarding evidence over the objection of defendant.
4. In the instruction given the Jury, and in refusing the instructions A & B offered by defendant and overruling its motion for a peremptory instruction, to all which rulings defendant at the time objected and excepted.

LOCKETT & WORSHAM.,
Att'ys for Defendant.

27 On Friday June 4th 1909 being 29th day of May 1909 term of Henderson Circuit Court the following order was entered herein:

This cause coming on to be heard on defendant's motion for a new trial, and the court considering same overrules it, to which ruling of the court the defendant objects and excepts and prays an appeal to the Court of Appeals which is granted, and the defendant is given until the 2nd day of September 1909 term of this court in which to file his bill of exceptions.

On Tuesday Sept. 7th 1909 being 2nd day of Sept. 1909 term of Henderson Circuit Court the following order was entered herein:

Order.

Came the defendant by attorney and tenders and moves the court to approve, sign and file its Bill of Exceptions and transcript of the evidence and a carbon copy thereof and the court orders the motion continued for the present.

28 On Saturday September 25th 1909 being 18th day of Sept. 1909 term of Henderson Circuit Court the following order was entered herein:

Order.

The court having examined and approved the bill of exceptions, and the transcript of evidence, made by the official stenographer of this court, in this case, it is now ordered that the instructions of the court be made part of the bill of exceptions and also a part of the record of this case and that the transcript of evidence be filed and made a part of the bill of exceptions and a part of the record of this case and it is also ordered that the bill of exceptions be filed and made a part of the record in this case without its being spread on the order book.

The Bill of Exceptions referred to above *are* here copied:

Bill of Exceptions.

Be it remembered, that on the trial of this case the evidence was taken by the Official Stenographer of this Court, and the transcript of said evidence, duly certified by said Stenographer and ap-
29 proved by the Judge, is made a part of this bill of exceptions.

Upon the conclusion of plaintiff's evidence the defendant moved the court to peremptorily instruct the jury to find for the defendant, which motion was overruled, to which defendant excepted.

At the close of the evidence the defendant moved the court to give the jury the following instructions:

A. The court instructs the jury to return a verdict for the defendant.

B. The court instructs the jury that the contract alleged by plaintiff having been made in September 1905 for the shipment of the corn in December 1906, even if made upon the basis of a ten cent rate, did not prevent the Railroad Company from changing the rate, and if the rate charged plaintiff was the rate applicable in December the Jury cannot find damages because said schedule was not on file in September.

But the court refused to give either of said instructions offered by defendant, to which defendant at the time excepted.

The court on its own motion gave the following instruction:

1. "Gentlemen of the Jury, the court instructs you to find for the plaintiff such an amount in damages as you shall believe
30 from the evidence will fairly and reasonably compensate the plaintiff for the loss, if any, sustained by it by reason of the sale of the corn in question that it made at the time complained of, if any, and which was occasioned and brought about by defendant's failure to have posted or on file in its office in Henderson, Ky. its freight tariff rate in question and by reason of any erroneous quotation of defendant of its freight rate from and to the points in question, of which plaintiff complains, not exceeding the sum of $1960.00, the amount claimed in the petition."

To the giving of the said instruction the defendant objected and excepted at the time. The above instruction given to the jury was

the only instruction given, and those refused were all that were offered and refused.

The jury having returned a verdict for plaintiff on May 27, 1909, thereafter on May 29, 1909, the defendant moved the court to render judgment dismissing the petition and for defendant's costs notwithstanding the verdict, which motion was overruled, to which the defendant at the time excepted.

The court having entered judgment for plaintiff in accordance with the Jury's verdict, the defendant on the next day entered its motion for a new trial and filed the following reasons therefor:

31 Henderson Circuit Court.

HENDERSON ELEVATOR COMPANY, Pl'ff,
vs.
ILLINOIS CENTRAL RAILROAD CO., Def't.

Motion & Reasons for a New Trial.

The defendant moves that the verdict herein be set aside and a new trial granted defendant because.

1. The court erred in overruling the demurrer to the petition.
2. Also in sustaining a demurrer to the first paragraph of defendant's answer.
3. In admitting and rejecting evidence over the objection of defendant.
4. In the instruction given the jury, and in refusing the instructions "A" and "B" offered by defendant, and overruling its motion for a peremptory instruction, to all which rulings the defendant at the time objected and excepted.

LOCKETT & WORSHAM,
Attorneys for Defendant.

Said motion coming on for a hearing, the court having considered the same, overruled said motion, to which the defendant at the time excepted and prayed an appeal to the court of appeals, which was granted.

32 Then came defendant and tendered this its Bill of Exceptions, which having been examined and approved by the Judge, is ordered to be filed and made a part of the record without it being spread on the Order Book.

J. W. HENSON,
Judge of the Henderson Circuit Court.

On May 26th 1909 the Defendant filed in the Office of the Clerk of Henderson Circuit Court its deposition, Said deposition is here copied:

In the Henderson Circuit Court.

HENDERSON ELEVATOR CO.
vs.
I. C. R. R. Co.

Depos. for Def't.

Deposition of A. C. Bowen, taken on behalf of Defendant in the above styled cause upon interrogatories and cross-interrogatories before Geo. W. Silvertooth, a notary public in and for Shelby county, Tennessee, at Memphis, Tenn., in his office at No. 11 North Main Street, in said City of Memphis, on the 25th day of May, 1909, pursuant to the attached agreement of counsel for the plaintiff and defendant.

33 Said witness A. C. BOWEN, being duly sworn, deposeth and sayth:

In answer to interrogatory No. 1, he saith:

1. In what capacity were you acting for the defendant Illinois Central Railroad Company from March 1, 1907, to April 1, 1907?

2. Did you mail to the agent of said Company at Henderson, Ky. during said time, or at any time, a copy of Illinois Central Feb. 28, 1907? State the date you mailed it, if you did so?

3. If you have to reply upon any record to be able to state that you mailed it, please make a correct copy from said record and mark it with your initials as part of your deposition. If you remember the fact without referring to the record omit that, but tell how you mailed it.

Cross-interrogatories by PLAINTIFF:

1. What enables you to call to mind the mailing of this tariff?

2. Have you any recollection of mailing this tariff, independent of any record you may have?

3. What kind of envelope was the tariff mailed in? What postage did it have on it?

4. Where did you mail the tariff? Did you drop it in the
34 post office or letter box yourself, or did some one else do it? If some one else, who?

5. Was the tariff sent by U. S. Mail, or was it sent through your regular train service?

6. How many other tariffs did you mail out at the same time?

7. Did you put the tariff in the envelope or package yourself? If you mailed the envelope or package personally, what shape was it in when it came to your possession? When it left your possession?

8. To whom did you deliver it?

9. If you mailed it in person, where was the box located in which you placed it? Was the box a government letter or parcel box, or was it the mailing file or box in your office?

10. How many people, or employees had access to the Tariff after it left your possession?

It is agreed the deposition of A. C. Bowen may be taken upon the above interrogatories and cross-interrogatories before any officer authorized to take depositions. Commission is waived. Regular proceedings in other respects as well as competency, are not waived.

May 21, 1909.

CLAY & CLAY,
Attorney- for Plaintiff.
LOCKETT & WORSHAM,
Attorneys for Defendant.

35 1. I was Mail Clerk in charge of distributing all tariffs issued or distributed by this office from March, 1907 to April 1907.

2. I did to the best of my knowledge and belief. The issue was mailed according to the records on March 7, 1907. The attached official record copy stamped in the upper right hand corner "March 7, 1907" indicates date upon which distribution of this tariff was made, and I mark it Exhibit A. to this my deposition.

3. Attached you will find a copy of the original Mailing List for A-13604 (and subsequent issues including D-13604) in accordance with which tariff D-13604 and supplement were distributed. This Mailing List includes the Henderson Agent. I mark said copy of mailing list Exhibit B. to this my deposition.

Cross-interrogatories:

1 through 10.

1. I have no recollection of mailing this particular issue, partly because of the time which has elapsed and partly because I mailed both prior to, at that time and since hundreds of other issues.

2. I have not.

3. The usual yellow railroad envelope. It was mailed
36 without postage, being sent railroad mail.

4. It was sent to the depot in our regular "Railroad Mail," by our regular Mail Carrier.

5. By regular train service.

6. I do not recall.

7. (*a*) I did.
(*b*) I do not recall.
(*c*) I do not recall.

8. I put it in the bin assigned to regular Railroad Mail.

9. I put it in the bin assigned to regular Railroad Mail.

10. The mailing bin is accessible to employés of the office.

Further deponent saith not.

A. C. BOWEN.

Sworn to and subscribed before me this 25th day of May 1909.

GWO. W. SILVERTOOTH,
Notary Public.

[SEAL.]

37 Interstate Commerce Commission No. A-5994. Cancels I. C. C. No. A-5669.
I. C. R. R. Tariff No. D-13604. Cancels Tariff No. C-13604.

Illinois Central Railroad Company.

Freight Tariff on Corn, C. L., to New Orleans, La., for Export to European Ports.

From—	Rates in cts. per 100 lbs. To— Evansville, Ind.	Henderson, Ky.	From—	Rates in cts. per 100 lbs. To— Evansville, Ind.	Henderson, Ky.
Lerna.....Ill.	..	..	Calhoun. .....Ill.	..	..
Janesville.... "	..	..	Parkersburg... "	..	..
Bradbury .. "	..	..	West Salem ... "	8	9
Toledo..... "	..	..	Bone Gap ..... "	..	..
Greenup..... "	..	..	Browns..... "	7	8
*Greenup Hill "	9	10	*Siegret..... "	..	..
Hildalgo..... "	..	..	Grayville..... "	..	..
Rose Hill.... "	..	..	Hovey.....Ind.	..	..
Falmouth.... "	..	..	Griffin ..... "	..	..
Newton ..... "	..	..	*Barret ..... "	5	6
Boos ..... "	..	..	Stewartsville .. "	..	..
*Becks..... "	.	..	New Harmony. "	..	..
West Liberty. "	..	..	Poseyville.... "	..	..
Dundas..... "	8	9	Wendel..... "	..	..
Olney.. ..... "	..	..	Martin..... "	..	5
*Quarry ..... "	..	..	Armstrong..... "	..	4½

*No agent. Freight must be prepaid.

Exhibit A to deposition of A. C. Bowen.
[SEAL.] G. W. S., *Notary.*

38 The through rate to be applied from the above stations to New Orleans, La., (for export), will be 13½ cents per 100 lbs.

Shipments will be billed to New Orleans at the through rate, or to Evansville, Ind., or Henderson, Ky., at the rate shown above, and when reconsigned to New Orleans (for export) will be way-billed from Evansville, Ind., or Henderson, Ky., at the difference between the through rate of 13½ cents per 100 lbs. to New Orleans, La., and the rates shown above to Evansville, Ind., and Henderson, Ky.

The above arrangement for reconsigning will apply when Corn is reshipped from Evansville, Ind., or Henderson, Ky., within 180 days after arrival at these points, and only when original paid freight bills covering the movement into Evansville, Ind., or Henderson, Ky., are surrendered.

NOTE.—In addition to the rate shown herein the Central Elevator & Warehouse Company will charge one (1) cent per 100 pounds for handling the grain from the cars into the elevator and thence into the vessels at New Orleans, La.

Issues February 28, 1907. Taking Effect April 1, 1907.
Issues by W. E. Keepers, General Freight Agent, Chicago, Ill.
39 D. W. Longstreet, General Freight Agent, Memphis, Tenn.
R. C. Perkins, G. F. A., New Orleans, La.
T. J. Hudson, General Traffic Manager, Chicago, Ill.
F. B. Bowes, T. T. May.
C. C. Cameron, G. F. A., Chicago, Ill.

(File G. R. 15-2869.) (File G. R. 659-339.)
Supplement No. 1 to Tariff D-1924 Supplement No. 1 to I. C. C. No. A-5993.
Supplement No. 1 to Tariff D-13604 Supplement No. 1 to I. C. C. No. A-5994.
Supplement No. 1 to Tariff D-18108 Supplement No. 1 to I. C. C. No. A-5991.

Illinois Central Railroad Company and Indianapolis Southern Railroad.

Supplement to Following Tariffs.

I. C. R. R. Tariff No.	I. C. C. No.	Description.
L 1925	A 5993	Corn and Oats, C. L., I. C. R. R. stations in Illinois and Indiana to New Orleans for export to European Ports.
D 13604	A 5994	Corn C. L., I. C. R. R. stations in Illinois and Indiana to New Orleans, La., for export to European Ports.
C 18108	A 5991	Corn, Rye, Oats, Wheat and Barley, C. L., from Chicago, Ill., to New Orleans for export to European Ports.

Rates published in above tariffs will not take effect until May 1, 1907.
Effective April 1, 1907. By special permission of the Interstate Commerce Commission March 29, 1907.

40 Issued by W. E. Keepers, G. F. A., Chicago, Ill.
D. W. Longstreet, Gen'l Fr't Agt., Memphis, Tenn.
R. C. Perkins, Gen'l Fr't Agt., New Orleans, La.
T. J. Hudson, Gen'l Traf. Mgr., Chicago, Ill.
F. W. Bowes, Fr't Tar'f Mgr., Chicago, Ill.
C. C. Cameron, Gen'l Fr't Agt., Chicago, Ill.
(File C. R. 659-339.)

Part of Exhibit "A."
[SEAL.] G. W. S., *Notary.*

Copy.

Mailing List, 1891, *for Tariff* A-13604.

C. A., New Orleans	50
G. F. A., New Orleans	10
Louisville	2
A. G. F. A., Evansville	2
Agent Evansville, Henderson.	

I certify that this is a correct copy of the original Mailing List.
A. C. BOWEN.

Exhibit B. to deposition of A. C. Bowen.
[SEAL.] G. W. S., *Notary.*

41 STATE OF TENNESSEE,
Shelby County, ss:

I, Geo. W. Silvertooth, a Notary Public in and for said State and County, do certify that the above and foregoing deposition of A. C. Bowen was taken before me, at my office in the City of Memphis, County of Shelby, State of Tennessee, on the 25th day of May 1909, upon the interrogatories and cross-interrogatories hereto annexed. That said witness was first sworn by me that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth, before giving his testimony. That the testimony was typewritten by a stenographer and afterward read over by said witness in my presence and subscribed by him in my presence.

I further certify that at the taking of said deposition neither party was present in person, nor represented by agent or attorney.

My commission as Notary Public expires Oct. 13, 1912.

GEO. W. SILVERTOOTH,
[SEAL.] *Notary Public.*

42 On July 26th 1909 the defendant executed a Supersedeas Bond in the office of the Clerk of Henderson Circuit Court. Said bond is here copied:—

Henderson Circuit Court.

ILLINOIS CENTRAL RAILROAD CO., Appellant,
against
HENDERSON ELEVATOR CO., Appellee.

Upon an Appeal from a Judgment of the Henderson Circuit Court
Rendered 27th day of May, 1909.

Supersedeas Bond.

Whereas, Said Appellant Illinois Central Railroad Co., having prayed an appeal from the judgment of the Henderson Circuit

Court, rendered at its May Term 1909, against it in favor of the Appellee, for the sum of ($1960.00) Nineteen hundred and sixty dollars with six per cent interest from May 27th 1909 and cost herein expended, and the Appellant desires to supersede the whole of the said Judgment above mentioned:

Now, We, Illinois Central Railroad Co., principal, and Attilla Cox, Jr., and John C. Worsham, sureties, do hereby covenant to and with the Appellee Henderson Elevator Co., that the Appellant will pay to the Appellee all costs and damages that may be adjudged against the Appellant on the Appeal, and also that they will satisfy and perform the whole Judgment above stated in case it shall be affirmed, and any Judgment or Order which the Court of Ap-
43 peals may render, or order to be rendered by the inferior court, not exceeding in amount or value the Judgment aforesaid. (And also pay all rents, hire, or damage which, during the pendency of the Appeal, may accrue on any part of the property of which the Appellee kept out of possession by reason of the Appeal.)

Witness our hands, this 26th day of July 1909.

The Bond is only required to be signed by the sureties.

ILLINOIS CENTRAL RAILROAD CO.,
By JOHN C. WORSHAM, *Att'y.*
ATTILLA COX, JR.,
By JOHN C. WORSHAM, *Att'y in Fact.*
JOHN C. WORSHAM.

Attest:
W. G. MOSELEY, *Clerk.*

1909, July 26. Filed.
Attest:
W. G. MOSELEY, *Clerk.*

The Power of Attorney, attached to the Bond is here copied:—

Power of Attorney.

Know all men by these presents: That I, Attilla Cox, Jr., do hereby nominate and appoint John C. Worsham my true and lawful agent and attorney in fact for me and in my name to sign my name as surety to a supersedeas bond to be executed by the defendant Illinois Central Railroad Company with me as its surety, to supersede the judgment rendered against it in plaintiff's favor for the sum of Nineteen Hundred and Sixty dollars, and I do hereby empower my said agent and attorney to do any and every other thing necessary to bind me to such supersedeas bond as may be necessary to supersede said Judgment.

44 Hereby ratifying the acts of my agent and attorney aforesaid in the premises, witness my signature this 24th day of July, 1909.

ATILLA COX, JR.

STATE OF KENTUCKY,
Jefferson County:

I, E. H. Boston, do certify that on this day in the state and county aforesaid personally appeared before me Attilla Cox, Jr., who acknowledged the foregoing power of attorney to be his act and deed.

Witness my hand and seal of office this 24th day of July, 1909.

[SEAL.] E. H. BOSTON,
Notary Public, Jefferson Co., Ky.

My commission expires Jan'y 31, 1910.

STATE OF KENTUCKY,
County of Jefferson, set:

Personally appeared before me Attilla Cox, Jr., who on oath, states that he is the owner of property in this State, over and above his debts and liabilities, subject to execution, to the value of $2,500.00.

ATILLA COX, JR.

Given under my hand and seal of office this 27 day of July 1909.

E. H. BOSTON,
Notary Public, Jefferson County, Ky.

My commission Expires Jany. 21st, 1910.

45 Upon the execution of the foregoing bond a certificate of Supersedeas and one copy was issued. Said certificate is here copied:—

Certificate of Supersedeas.

STATE OF KENTUCKY:

Certificate.

Clerk's Office of the Henderson Circuit Court.

I do certify that an appeal has been granted from this court from a judgment obtained by Henderson Elevator Company against Illinois Central Railroad Company, for ($1960.00) Nineteen hundred and Sixty dollars with six per cent interest from May 27, 1909 in the Henderson Circuit Court at its May Term, 1909, and that a Supersedeas bond has been executed within sixty days after the Appeal was granted. Wherefore the appellee and all others are commanded to stay proceedings on the judgment.

Witness my hand as Clerk of said court this 26th day of July, 1909.

W. G. MOSELEY, *Clerk.*

The foregoing certificate was returned to the office from whence it issued with the following official endorsement thereon:—

46 Executed the within supersedeas on the Henderson Elevator Co. by delivering to C. M. Bullitt, President of said Co. a true copy hereof July 27, 1909.

ED. MELTON, *S. H. C.*,
By FRED EBLENS, *D. S.*

STATE OF KENTUCKY,
County of Henderson, set:

I, W. G. Moseley, Clerk of the Henderson Circuit Court, same being a Court of record in and for the County and State aforesaid, do hereby certify that the foregoing 45 pages from 1 45 inclusive, contains a true and complete transcript of all the record and proceedings in the case wherein Henderson Elevator Company is Plaintiff and Illinois Central Railroad Company is defendant, as found of record in my office and directed to be copied per defendant's schedule.

Given under my hand as Clerk of said Court, this the 19 day of November 1909.

W. G. MOSELEY.
Clerk Henderson Circuit Court.

Clerk's fee for making said Transcript $11.10.

47 Henderson Circuit Court.

HENDERSON ELEVATOR COMPANY, Plaintiff.
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

Transcript of Evidence.

Clay & Clay counsel for plaintiff.
Lockett & Worsham counsel for defendant.

48 Witness MALCOLM BULLITT being called on behalf of plaintiff and being first duly sworn testified as follows:

Examination by JAS. W. CLAY, Att'y for Plaintiff:

Q. What is your connection with the Henderson Elevator Company?
A. I am president of the Henderson Elevator Company.
Q. That Company is a corporation is it?
A. Yes sir.
Q. What business is it engaged in?
A. Buying and selling grain.
Q. How long have you been engaged in that business?
A. For a great many years.
Q. This suit grows out of a transaction which took place in September 1907 I believe?
A. Yes sir.
Q. I will get you just to state to the jury the facts in connection with the obtention of the rate and the steps that you took leading

to the sale of any corn that you made, or shipment to New Orleans and the other facts connected with it.

Defendant objects to the question and the introduction of any evidence bearing upon the points suggested in the question upon the ground that the plaintiff stated no cause of recovery in the petition, which objection the Court overrules, to which defend-
49 ant excepts.

A. Along about the 1st of September we were buying and selling corn. We operate on the Illinois Central Railroad several small receiving points at which we buy grain. These points that are in question are North of Evansville in Indiana, Poseyville and several country stations over there. A few years before this the Illinois Central Railroad Company at our request issued a tariff so that we could buy grain in that territory and bring it into Henderson and handle it, and clean it and weigh and re-ship it out to New Orleans for export. We had been engaged in this buying of grain and shipping it to New Orleans for several years. The Illinois Central Railroad, we are on the mailing list for their tariffs and they send to us or are supposed to send us the tariffs and changes in the tariffs and rates that affect our business.

Defendant objects to what the witness has said about the Railroad Company being "supposed to send changes in tariff rates," and its objection was sustained and said words were withdrawn from the jury.

Q. Had they been sent heretofore?

A. They had been sending them and they are sending them today. Every day we are getting directions from the Illinois Central Railroad. We keep a regular file in our office of the various
50 tariffs. In September we were buying grain at these stations and we entered into negotiations by correspondence with a large export house with whom we had been doing business for several years, regarding the sale of some corn delivered at New Orleans for export. That is we bill it for export to New Orleans and pay the freight on it. They said that they were in the market.

Q. Who?

A. Hall-Baker Grain Company. They are large grain exporters to European countries, they have headquarters at Kansas City and branch office at New Orleans. Our correspondence was with the Kansas City office. They said that they were in the market and asked me to make them a price delivered at New Orleans. I looked over the tariffs we had and found that the one we had on our file was the one we had been using for the past twelve months, making the rate ten cents a hundred.

Q. Is that a copy of the tariff that you had?

A. Yes sir; that is a copy of the tariff. It was known as C13604.

Q. Is the paper that I have handed you the copy of the tariff attached to the petition in this case?

A. Yes sir.

51 Q. Will you read the tariff and file it as a part of your testimony?

The said tariff is here read and is in words and figures as follows:

"Interstate Commerce Commission No. A-569
Cancels I. C. C. No. A-5354.

I. C. R. R. Tariff No. C-13604—Cancels Tariff # B-13604.

Illinois Central Railroad Company Freight Tariff on Corn, C. L., to New Orleans, La., for Export, European Ports,

From—	Rates in cts. per 100 lbs. To— Evansville, Ind.	Henderson, Ky.	From—	Rates in cts. per 100 lbs. To— Evansville, Ind.	Henderson, Ky.
Lerna	Ill. ..	..	Calhoun	Ill. ..	..
Janesville,	" ..	..	Parkersburg	" ..	..
Bradbury	" ..	..	West Salem	" 8	9
Toledo	" ..	..	Bone Gap	..	..
*Norviel	" ..	..	Browns	7	8
Greenup	" 9	10	*Siegert	..	..
*Greenup Hill	" ..	..	Grayville	..	..
Hidalgo	" ..	..	*Hovey	Ind. ..	..
Rose Hill	" ..	..	Griffin	" ..	..
Falmouth	..	..	*Barret	..	..
Newton	" ..	..	Stewartsville	5	6
Boos	" ..	..	New Harmony	..	..
*Becks	" ..	..	Poseyville	..	..
West Liberty	" ..	..	*Wendel	..	..
Dundas	" ..	..	Martin	..	5
Olney	" ..	..	Armstrong	..	41½
*Quarry	" ..	..			

52 *No agent. Freight must be prepaid.

The through rate to be applied from the above station to New Orleans, (for export) will be .12¢ per 100 lbs. Shipment will be billed to New Orleans, at through rate, or to Evansville, Ind. or Henderson, Ky. at the rate shown above, and when reconsigned to New Orleans (for export) will be way-billed from Evansville, Ind. or Henderson, Ky. at the difference between the through rate of 12 cents per 100 lbs. to New Orleans, La. and the rates shown above to Evansville, Ind. and Henderson, Ky.

The above arrangement for reconsigning will apply when corn is reshipped from Evansville, Ind. or Henderson, Ky., within 180 days after arrival at these points and only when original paid freight bills covering the movement into Evansville, Ind. or Henderson, Ky. are surrendered.

NOTE.—In addition to the rate shown herein the Central Elevator & Warehouse Company will charge one and eight-tenths (1.8) cents per 100 lbs. for handling the grain from the cars into the

Elevator and thence into the vessel at No. O. La. Issues August 20, 1906. Taking effect Sept. 1, 1906.

W. E. Keepers, GFA, Chicago, Ill.
R. C. Perkins,
T. J. Hudson,
C. C. Cameron, GFA, Memphis, *Ky.*
D. W. Longstreet,
F. B. Bowes.

53 Supplement to Freight Tariff on Corn C. L. from station in Illinois and Indiana to New Orleans, La. for export to European ports.

Substitute the following for note shown in Tariff:

The through rate to be applied from the above stations to New Orleans, La. (for export) will be ten cents per 100 lbs.

Shipment will be billed to New Orleans at the through rate or to Evansville, Ind. or Henderson, Ky. at the rate shown above, and when re-consigned to New Orleans (for export) will be way billed from Evansville, Ind. or Henderson, Ky. at the difference between the through rate of ten cents per 100 lbs. to New Orleans, La. and the rate shown above to Evansville, Ind. and Henderson, Ky.

The above arrangements for reconsigning will apply when corn is reshipped from Evansville, Ind. or Henderson, Ky., within 180 days after arrival at these points, and only when original paid freight bills covering the movement into Evansville, Ind. or Henderson, Ky. are surrendered.

NOTE.—In addition to the rate shown herein the Central Elevator & Warehouse Company will charge one (1) cent per 100 lbs. for handling the grain from the cars in the elevator and thence into the vessels at New Orleans, La.

Effective September 6, 1906.

54 W. E. Keepers,
G. F. A. Chicago, Ill.
R. C. Perkins,
G. F. A. New Orleans, La.
T. J. Hudson,
G. T. M. Chicago, Ill.
C. C. Cameron,
G. F. A. Memphis, Tenn.
D. W. Longstreet,
G. F. A. Louisville, Ky.
F. B. Bowes,
F. T. M. Chicago, Ill.

A. L. (File GR-659-339.) 6-7-06-125."

Q. If there is anything in the tariff rate which you wish to explain or state, please do so now. When you say traiff you mean the tariff and the supplement which is attached?

A. Yes sir; this tariff makes a rate from these stations on the I. C. in Indiana of ten cents a hundred to New Orleans. The tariff states that this grain can be billed to Henderson, Ky. stopped for cleaning, weighing and whatever the local rate may be it doesn't make any difference what that may be from the point in Indiana to Henderson, but when we re-ship the grain within 180 days to New Orleans we pay out the balance of the rate so as to make the rate in and out 10 cents per hundred. In other words the rate from the point in Indiana to New Orleans is 10 cents per hundred. That

was the tariff we had been working under and the tariff that I had in my possession at the time of the negotiations with the Hall-Baker Grain Company. The railroad very often changes its tariff and issues supplements as they did to this.

55 Q. By that supplement was the rate changed?

A. Yes, this supplement that was issued in September 1906 made the 10 cent rate. The old tariff had a different rate but the supplement made the 10 cent rate.

Q. Was any tariff or schedule ever given to you or the Henderson Elevator Company from the date of the receipt of that supplement up to September 19th, 1907 by the railroad company?

Objection by defendant. Sustained. Exception.

Q. This supplement which fixes the rate of 10 cents was issued in September 1906 was it?

A. Yes sir.

Q. How long did the Henderson Elevator Company ship grain under that supplement, when was the first notice it had of any change?

A. We shipped a great deal of grain during the months of November, December and January 1906 and 1907 under this tariff. We didn't ship any more in the spring because we found better markets in other directions.

Q. What was the first notice that the Henderson Elevator Company had of the change in the tariff, if any?

A. When we were in negotiations with these exporters, Hall-Baker Company I took this tariff in my hand and went into

56 the office of the Illinois Central Railroad Company as I had quite often done when I wanted to check up my tariff, and asked to see their tariffs. Told them what I wanted; that I was negotiating for the sale of grain for New Orleans and that I wanted to see if there had been any changes to it, or any other tariff affecting the rate. The agent looked at this tariff and stated that he not only didn't have this tariff but didn't have any other tariff. He never had this tariff.

Q. Who was the Agent?

A. Mr. Geo. Waltz; he stated that he didn't have the tariff on grain to New Orleans. I asked him to ascertain whether this tariff was in effect. He took a memorandum of the number of this tariff with the supplement and said that he would find out from the Contracting Office at Evansville and let me know. A few days after that he came to me with a letter in his hand from the Freight Agent, Mr. Convery and handed me the letter. This was some place between the 10th and 12th of September.

Q. Have you a copy of that letter that was handed to you by Mr. Waltz?

A. No; Mr. Waltz has.

Q. I hand you a copy of a letter dated Evansville, Ind. September 9th, 1907 addressed to Geo. H. Waltz, Agent, signed by

57 J. B. Conbery, Commercial Agent, I will get you to state whether or not that is the original letter shown you by Mr. Waltz at that time?

A. This is the original letter that Mr. Waltz brought over to me, which is in words and figures as follows:

"EVANSVILLE, IND., *September 9th*, 1907.

Mr. Geo. H. Waltz, Henderson, Ky.

DEAR SIR: Replying to your favor of the 6th instant relative to the present rate on corn and wheat from Henderson to New Orleans for export and also from Illinois points.

The present rate on corn, car load, from Henderson Ky. to New Orleans for export, except Cuba, is 10¢, minimum capacity of the car.

Tariff A-18620 carries rates on grain and grain products from Indiana and Illinois points to New Orleans for export to Cuba, South America, Puerto Rico and Atlantic Coast Ports in Mexico.

Tariff C-13604 carries rate on corn from Indiana and Illinois to New Orleans for export to European Ports.

Tariff L-1924 from Indiana and Illinois on corn and oats to New Orleans for export to European Ports.

Tariff B-3580 covers wheat, Henderson to New Orleans
58 (Stuyvesant docks) for export. I have not copy of Tariff B-3580 on file and I cannot quote you the rates from Illinois points unless you could advise the specific points from which the grain is to move.

I would, therefore, suggest that you order for the Henderson Elevator Co. the copies of Tariffs mentioned by me.

Yours truly,

J. B. CONVERY,
Commercial Agent."

IC-CCL.

Q. The tariff C-13604, that is the tariff that you operated under?

A. That was the tariff I had been operating on and the only tariff that I had.

Q. When Mr. Waltz gave you that letter what did he say?

A. When he gave me this letter he said that the tariff which I had was in effect, quoting the 10 cent rate from points in Indiana and Illinois to New Orleans.

Q. To go back, when you were there in the office with Mr. Waltz, what examination was made to ascertain if any change had been made in that tariff?

A. We hunted through his file of tariff to see if he had any at all. I assisted him in going through his boxes and drawers and we couldn't find any.

59 Q. Was any tariff posted in his office?

A. No sir; but he looked through his files.

Q. You say there was no change in that tariff and no tariff was posted in the office?

A. No sir; and so of course when I was notified that this tariff was in effect this was about the 10th or 12th of the month, soon after I was shown this letter, the Hall-Baker Grain Company asked us to make them a price on grain delivered at New Orleans. I sat

down to figure on the cost of my grain and added the freight and figured on a rate of 10 cents a hundred, and sat down and wrote them a telegram based on that freight and offered them 100,000 bushels of corn, which they accepted.

Q. You say that in making that offer "I offered to sell them" did you make the offer or did they offer the price for the corn?

A. I made the price myself.

Q. And they accepted that offer?

A. Yes sir.

Q. And your offer was based on a 10 cent freight rate?

A. Yes sir; of course, I wouldn't have offered it at the price I did on any other rate.

Objection by defendant. Overruled. Exception.

After having closed the trade by receiving their acceptance
60 I notified Mr. Waltz that I had sold this 100,000 bushels of grain and thought nothing more about it until five days afterwards I received from this Commercial Agent, Convery's office another letter inclosing a new tariff.

Q. Is that the letter you receiv*ing* inclosing the new tariff?

A. Yes sir; that's the letter.

Q. What do you know about Mr. Convery, what do you know about his having authority to act for the Illinois Central?

A. All I know about Mr. Convery is that he is, or was Commercial Agent at that time in charge of this territory as commercial Agent. Quite frequently I would go to Mr. Waltz to ascertain a rate and he would call up Mr. Convery as he was supposed to keep a complete file of tariffs and give the rate just as was done in this case.

Q. Do you know him personally?

A. Yes sir.

Q. Do you know that he is Commercial Agent?

A. Yes sir; we had been accustomed, just as this letter will show you, when he received tariffs bearing on rates on grain he sent us copies of them.

Q. When did you receive the letter that you have before you?

61 A. On the 19th of September, 1907. The letter is addressed to A. Waller & Co. and Henderson Elevator Co. and is in words and figures as follows:

"EVANSVILLE, INDIANA.

A. Waller & Co., Henderson Elevator Co., Henderson, Ky.

DEAR SIRS: As a matter of information we inclose herewith copy of I. C. Tariff D-13604 naming through rate of 13½¢ per 100 lbs. from Peoria Division stations to New Orleans on grain for export to be handled at Henderson.

In addition to the rate, it will be observed that the Central Elevator and Ware-house will make a charge of 1¢ per 100 lbs., for handling grain from cars into elevator and thence into vessels.

Yours truly,

J. B. CONVERY,"
Commercial Agent.

Q. That was the letter given you with the Tariff D-13604?
A. Yes, this was mailed to us from Evansville with a copy of the tariff.
Q. That new tariff mailed with your letter give what rate?
A. Thirteen and one-half cents instead of ten cents.
62 Q. Have you a copy of the tariff that you received with that letter?
A. Yes sir.
Q. When does that tariff show that it was issued?
A. This tariff was effective April 1, 1907.
Q. When was the first notice that you had of that tariff?
A. On the 19th of September 1907.
Q. When did you receive the copy of it from Mr. Convery?
A. Five days after I had closed my contract.
Q. Had you been notified, or did you personally know anything about that tariff prior to that time?
A. No sir; it was very much of a surprise to me when I received it.
Defendant objects.
Q. Had the Henderson Elevator Co. received any notice or have any knowledge of it?
A. It did not.
Q. What officers of the Henderson Elevator Company give these matters their personal attention and have them in charge?
A. I look up all tariffs and rates.
Q. How much corn did you ship under that contract with
63 the Hall-Baker Grain Company?
A. Filled my contract; shipped 100,000 bushels.
Q. What rate did you pay?
A. Thirteen and one-half cents.
Q. Did you make any objection to paying the rate?
A. I certainly did; yes sir.
Q. Do you remember what was said at the time?
A. Yes sir; the General Freight Agent, Mr. C. C. Cameron of Chicago, Ill. stated that he was exceedingly sorry that one of his employés should make such a mistake.
Q. Did you take the matter up by correspondence?
A. Yes sir.
Q. You paid the freight rate of 13½ cents?
A. Yes sir.
Q. What was the difference between the 10 cent and the 13½ cent rate?
A. It was 3½ cents. $1960 represents my loss in the transaction.

Cross-ex. by JNO. W. LOCKETT for Defendant:

Q. How long have you been in the grain business here?
A. 10 or 12 years.
Q. Have you all of the time been looking after the schedules, freight rates for the company?
A. I have Clerks in there, but I make it a rule that all
64 tariffs are laid on my desk to see if there is anything that bears on my business.

Q. You had this tariff that we have been speaking of there?

A. No sir; that tariff was never received by us. Never saw it until the 19th of September 1907.

Q. What day did you go over to see Mr. Waltz about it?

A. I couldn't say exactly, but I think about the 6th of September. That is the day he wrote. I know I asked him to write that day. I should say about the 6th of September.

Q. You have had an experience of 12 years buying and shipping grain?

A. Yes sir.

Q. You say you bought the corn in Indiana at different points shipped at local rate to Henderson and that you were entitled to ship it to New Orleans at the rate of 10 cents a hundred under that first tariff?

A. Yes sir.

Q. When you sold the corn you didn't know of any change in the rate, but had made inquiry?

A. Yes, I used every precaution that a business man would use.

Q. Are you in the grain business also at Louisville?

A. Yes sir.

65 Q. Do you have the tariffs of lines from there?

A. No these tariffs bear strictly on Henderson business.

Q. Did you know at the time that you went over to the office that there had been an increase in the rates at points in Indiana to New Orleans?

A. No sir; I certainly did not. I had not the slightest idea that that rate had been changed. I went over to ascertain any probable change; that's the reason I went over there.

Q. How long after you got that notice on the 19th of September until you shipped the corn to New Orleans?

A. We contracted to ship it in December and we shipped it. The contract was made on the 14th of September.

Q. You mean the following December?

A. Yes sir.

Redirect examination by JAS. W. CLAY for Pl'ff:

Q. Explain that, is the rate, is the privilege of shipping the grain from Indiana points into Henderson and re-consigning it, a rate given to the Indiana points or a rate given to the shippers of Henderson?

A. The tariff was published especially for our benefit.

Q. If there is anything else that you have not covered bearing on the case state it now.

A. In regard to these tariffs I will say that in some of these instances there are stations which have no agent and therefore it would not be possible to follow the tariff. Barrett's Ind. is one of these places. There is no agent there and of course no tariff.

66

Objection by defendant. Overruled. Exception.

Q. During your 12 years' business experience in Henderson

where and from whom did you get your tariffs on shipment of grain over the I. C., from what Agent of the Co.?

Objection by defendant. Overruled. Exception.

A. We got tariffs bearing on rates that effected the Illinois Central North of the Ohio River from Chicago General Office and tariffs that effected rates South of the Ohio River from Memphis. Occasionally we got them from the Illinois Central mailed to us from Louisville, but only occasionally.

Q. What agent of the Company did you go for information concerning the tariff and freight rates?

A. I went to the Agent of the Illinois Central at Henderson, Kentucky in all cases.

Witness GEORGE H. WALTZ being called on behalf of plaintiff and being first duly sworn testified as follows:

Examined by Mr. JAMES W. CLAY for Plaintiff:

Q. What is your occupation?

A. Agent for the Illinois Central Railroad at Henderson, Kentucky.

67 Q. How long have you been Agent of the Illinois Central at Henderson?

A. Since March 1907. 28th of March 1906.

Q. You were the agent of the Illinois Central then in September 1907?

A. Yes sir.

Q. Do you remember the time——

A. It was March 1907 I came here.

Q. You had charge then as agent of the Illinois Central Railroad office in Henderson September 1907?

A. Yes sir.

Q. As agent who was the custodian of the schedules in your office at that time?

A. I was.

Q. I will get you to state when schedule D-13604 was first filed in your office if you know?

A. The first record I have, the first time I ever found it was in September, about the 17th, 1907.

Q. Do you remember Mr. Bullitt coming in there to inquire about tariff on shipments of corn from Indiana points to New Orleans in September 1907?

A. Yes sir.

Q. Just state to the jury what Mr. Bullitt said to you and what was the result, and if you made any investigation what the

68 result of that investigation was?

A. He said he wanted to figure on the sale of some corn for export and asked if I had any tariff from Indiana and Illinois points. I could not find that I had one and I told him that I would take it up with our Commercial Office in Evansville and see if they had a tariff that I couldn't find that we had one.

Q. Did you make a search in your office at that time?

A. Yes sir; and also looked to see if I could find anything that would apply to it.

Q. You didn't find any tariff and so reported to Mr. Bullitt?

A. Yes sir.

Q. I will get you to state whether or not you took it up with the Commercial Agent?

A. Yes sir.

Q. At the time you had that conversation did Mr. Bullitt have with him the old tariff C-13604?

A. Yes sir; he had a tariff that he said he had been using.

Q. You examined that?

A. I don't know that I examined it, he had it in his hands.

69 Q. Didn't you take the number from Mr. Bullitt?

A. Yes sir; and wrote to Mr. Convery and gave him that tariff number.

Q. Have you the letter that you wrote to Mr. Con*b*ery?

A. I believe I handed it to Mr. Lockett.

Q. Who is Mr. Convery?

A. Commercial Agent of the Illinois Central Railroad at Evansville, Ind.

Q. As commercial agent, what is his business?

A. Soliciting Freight Agent, quotes rates &c.

Q. If you have anything in your office that you don't know the rate on to whom do you apply for the information?

A. At that time we applied to Mr. Convery. He made Henderson regularly as a part of his territory.

Q. Is that the letter you wrote to Convery?

A. Yes sir; that is a copy.

Plaintiff asks that the letter be read, which is in words and figures as follows:

"HENDERSON, KY., *September* 6, 1907.

Mr. J. B. Convery, Commercial Agent, Evansville, Ind.

DEAR SIR: Please advise present rate on corn and wheat

70 to New Orleans for export from Henderson proper and when from Illinois points, also tariffs covering.

Henderson Elevator anticipates doing business to New Orleans for export and want to see if they cannot make some contract. Henderson Elevator Company say Tariff D-13604 Supplement No. 2 was used last year in this business but the same is not on file here.

Yours truly,

GEO. H. WALTZ, *Agent.*"

Q. Subsequently you received a letter from Mr. Con*b*ery in answer to that letter?

A. Yes sir.

Q. That letter is the one Mr. Bullitt read to the jury?

A. Yes sir.

Q. What did you do with the letter dated September 9th after you received it?

A. I took it at once to Mr. Bullitt and showed it to him as he asked me for that information.

Q. Did you say anything to him at the time?

A. I don't remember what I said except to show him the letter.

Q. Did you tell him the rate was 10 cents.

A. I remember telling him that tariff C-13604 was effect-
71 ive. I don't — that I said anything else.

Q. When the Henderson Elevator shipped the corn what freight rate did they pay on the shipment?

A. Rate of 13½ cents I presume. I couldn't tell. We shipped lots of corn during the month of December.

Q. Do you remember now what the rate was on this particular shipment?

A. No sir.

Q. What is the rate now from these points to New Orleans?

Objection by Defendant. Overruled. Exception.

A. (No answer.)

Mr. MALCOLM BULLITT recalled by attorney for def't:

Q. When you went with Schedule C to the office of the defendant you inquired if that was still in force, or if there had been any change in it, then where was the corn, the 100,000 bushels you wanted to ship?

A. We had some of it at our country stations and we had contracted for the other to come in.

Q. What proportion of it was in barn and what to be delivered in future?

A. I couldn't say exactly; perhaps the greater part was bought under contract to be delivered.

72 Q. Was it yet to be gathered that had not come in?

A. Yes sir.

Q. Then you were contracting in September for the sale of 100,000 bushels of corn the greater part of which was to be gathered as it matured in the field?

A. Yes sir; that is correct.

Mr. CLAY for plaintiff:

Q. The contracts were made for actual delivery were they?

A. Yes sir; that is our usual custom.

Q. You say that was the custom, but in this particular instance was the contract for actual delivery or not?

A. For actual delivery.

Q. You bought the corn outright from your customers?

A. Yes sir.

Mr. LOCKETT for defendant:

Q. That delivery was made in December and January?

A. Yes sir.

Mr. CLAY for plaintiff:

Q. In your sales to the Hall-Baker Grain Company state whether

or not it was an outright and absolute sale, or a sale that you had the right to cancel at any time?

Objection by Defendant. Overruled. Exception.

A. It was an absolute contract that we had to fill.

73 Q. State whether or not you did fill it according to the terms of your contract?

A. I did fill it according to the terms of the contract.

Q. Made on the 14th of September?

A. Yes sir.

Plaintiffs rest.

Defendant here offered to read in evidence the schedule of the Illinois Central Railroad tariff No. D-13604 issued February 28th, 1907, taking effect April 1, 1907, certified by Edward A. Moseley, Secretary of the Inter-state Commerce Commission and under seal as evidence in the case, which is in words and figures as follows, to the introduction of which the plaintiff objects, which the court overrules to which the plaintiff excepts.

Defendant here read the deposition of A. C. Bowen:

Q. In what capacity were you acting for the defendant Illinois Central Railroad Company from March 1, 1907 to April 1, 1907?

74 A. I was mail clerk in charge of distributing all tariffs issued or distributed by this office from March 1907 to April 1907.

Q. Did you mail to the agent of said company at Henderson, Ky. during said time, or at any time, a copy of Illinois Central Railroad Company tariff D-13603—I. C. R. R. No. A 5944 issued Feb. 28, 1907? State the date you mailed it if you did so?

A. I did to the best of my knowledge and belief. The issue was mailed according to the records on March 7, 1907. The attached official record copy stamped in the upper right hand corner "March 7, 1907" indicates date upon which distribution of this tariff was made, and I mark it Exhibit A to this my deposition.

Q. If you have to rely upon any record to be able to state that you mailed it, please make a correct copy from said record and mark it with your initials as part of your deposition. If you remember the fact without referring to the record omit that, but tell how you mailed it.

A. Attached you will find a copy of the original Mailing List for A-13604 (and subsequent issues including D-13604) in accordance with which tariff D-13604 and supplement were distributed. This

75 mailing list includes the Henderson Agent. I mark said copy of mailing list Exhibit B to this my deposition.

Cross-examined by plaintiff:

Q. What enables you to call to mind the mailing of this tariff?

A. I have no recollection of mailing this particular issue, partly because of the time which has elapsed and *partly because of the time which has elapsed* and partly because I mailed both prior to, and at that time and since hundreds of other issues.

Q. Have you any recollection of mailing the tariff, independent of any record you may have?

A. I have not.

Q. What kind of envelope was the tariff mailed in? What postage did it have on it?

A. The usual yellow railroad envelope. It was mailed without postage, being sent railroad mail.

Q. Where did you mail the tariff? Did you drop it in the post office or letter box yourself, or did some one else do it? If someone else, who?

A. It was sent to the depot in our regular "Railroad Mail" by our regular Mail Carrier.

Q. Was the tariff sent by U. S. Mail, or was it sent through your regular train service?

76 A. By regular train service.

Q. How many other tariffs did you mail out at the same time?

A. I do not recall.

Q. Did you put the tariff in the envelope or package yourself? If you mailed the envelope or package personally what shape was it in when it came to your possession? When it left your possession?

A. (*a*) I did: (*b*) I do not recall: (*c*) I do not recall.

Q. To whom did you deliver it?

A. I put it in the bin assigned to regular railroad mail.

Q. If you mailed it in person, where was the box located in which you placed it? Was the box a government letter or parcel box, or was it the mailing file or box in your office.

A. I put it in the bin assigned to regular Railroad Mail.

Q. How many people, or employés had access to the Tariff after it left your possession?

A. The mailing bin is accessible to employés of the office.

A. C. BOWEN."

77 Plaintiff moves the Court to exclude the testimony of Bowen upon the ground of incompetency, which motion is sustained, to which the defendant excepts.

At the conclusion of all of the evidence the defendant moved the Court for a peremptory instruction, which motion is overruled to which the defendant objects and excepts.

The end.

78 The schedule of the Illinois Central Railroad tariff No. D-13604 referred to and made a part of the evidence in this case at page 73 and the Secretary's certificate are in words and figures as follows:

"Interstate Commerce Commission.
Office of the Secretary.
Washington.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the schedule hereto attached is a true copy of Illinois Central Railroad Company Tariff No. D-13604, I. C. C. No. A-5994, filed with the said Interstate Commerce Commission on March 2, 1907.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 14th day of May A. D. 1909.

EDWARD A. MOSELEY,
Secretary of the Interstate Commerce Commission."

79 "Interstate Commerce Commission No. A-5994. Cancels I. C. C. No. A-5669.
I. C. R. R. Tariff No. D-13604. Cancels Tariff No. C-13604.

Illinois Central Railroad Company.

Freight Tariff on Corn, C. L., to New Orleans, La., for Export to European Ports.

From—		Rates in cents per 100 lbs. To— Evansville, Ind.	Henderson, Ky.
Lerna,	Ill.	..	..
Janesville,	"	..	..
Bradbury,	"	..	..
Toledo,	"	..	..
Greenup,	"	..	..
*Greenup Hill,	"	9	10
Hidalgo,	"	..	..
Rose Hill,	"	..	..
Falmouth,	"	..	..
Newton,	"	..	..
Boos,	"	..	..
*Becks,	"	..	..
West Liberty,	"	..	..
Dundas,	"	8	9
Olney,	"	..	..
*Quarry,	"	..	..

From—		Rates in cents per 100 lbs. To—	
		Evansville, Ind.	Henderson, Ky.
Calhoun,	Ill.	..	..
Parkersburg,	"	..	..
West Salem,	"	8	9
Bone Gap,	"	..	..
Browns,	"	7	8
*Siegert,	"	..	..
Grayville,	"	..	..
80			
Hovey,	Ind.	..	..
Griffin,	"	..	..
*Barret,	"	5	6
Stewartsville,	"	..	..
New Harmony,	"	..	..
Poseyville,	"	..	..
*Wendel,	"	..	..
Martin,	"	..	5
Armstrong,	"	..	4½

*No agent. Freight must be prepaid.

The through rate to be applied from the above stations to New Orleans, La. (for export) will be 13½ cents per 100 lbs.

Shipment will be billed to New Orleans at the through rate, or to Evansville, Ind. or Henderson, Ky., at the rate shown above, and when reconsigned to New Orleans (for export) will be way-billed from Evansville, Ind., or Henderson, Ky. at the difference between the through rate of 13½ cents per 100 lbs. to New Orleans La. and the rates shown above to Evansville, Ind. and Henderson, Ky.

The above arrangement for reconsigning will apply when corn is reshipped from Evansville, Ind. or Henderson, Ky. within 180 days after arrival at these points and only when original paid freight bills covering the movement into Evansville, Ind. or Henderson, Ky. are surrendered.

81 NOTE.—In addition to the rate shown herein the Central Elevator & Warehouse Company will charge one (1) cent per 100 pounds for handling the grain from the cars into the elevator and thence into the vessels at New Orleans, La.

Issued February 28, 1907. Taking effect April 1, 1907.
Issued by
W. E. Keepers, General Freight Agent, Chicago, Ill.
D. W. Longstreet, General Freight Agent, Memphis, Tenn.
R. C. Perkins, General Freight Agent, New Orleans, La.
T. J. Hudson, General Traffic M'n'g'r, Chicago, Ill.
F. B. Bowes, Freight Traffic Mgr., Chicago, Ill.
C. C. Cameron, General Fr't Agt., Chicago, Ill."

82 STATE OF KENTUCKY,
County of Henderson:

I, Augusta FitzGibbon, Official Stenographer for the Henderso Circuit Court, do certify that the foregoing is a complete and accu rate copy of the evidence heard in the trial of the case of Hende son Elevator Company against the Illinois Central Railroad Compan at the May term 1909 of the Henderson Circuit Court.

Given under my hand this September 25th 1909.

AUGUSTA FITZGIBBON,
Stenographer.

STATE OF KENTUCKY,
County of Henderson:

I, J. W. Henson, Judge of the Henderson Circuit Court hereb certify that the within and foregoing is a full, true and comple transcript of the evidence introduced by both parties on the trial the case of Henderson Elevator Compan- vs. Illinois Central Rai road Company tried at the May term 1909 of the Henderson Circu Court.

Given under my hand this September 25th 1909.

J. W. HENSON,
Judge Henderson Circuit Court.

83 Be it remembered that on the 5th day of January, 191 at a Court of Appeals held at the Capitol, in Frankfort, th following order was entered:

I. C. R. R. Co.
v.
HENDERSON ELEVATOR COMPANY.

Henderson.

Came appellan*y* by counsel and filed statement and moved th Court to grant an oral argument herein, which motion is su mitted.

The motion and statement referred to in the above order is as fo lows:

84 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
HENDERSON ELEVATOR COMPANY, Appellee.

Appellant's Statement and Motion for Oral Argument.

Appellant moves the Court for an oral argument of this case an for grounds says:

The action is for $1960.00 claimed by Appellee of Appellant upo the ground that Appellee entered into a contract to sell 100,0

bushels of corn to a New Orleans exporter at price which Appellee fixed based upon an Interstate freight rate at 10 cents per 100 pounds applicable from Indiana points on Appellant's railroad to New Orleans through reconsignment at Henderson, information that the rate was 10 cents having been given Appellee by Appellant's agents through error when the Interstate rate was really 13½ cents.

The case involves the true construction of the Interstate Commerce Act; and similar questions have been before the United States Supreme Court in T. & P. Ry. Co. v. Mugg, 202 U. S. 242 and Abilene, &c. vs. T. & P. Ry. Co. 204 U. S. 426.

85 The trial court, as appears (p. 19) instructed for Appellee if its loss was occasioned by Appellant's failure to have posted or on file at Henderson its freight tariff, and by reason of erroneous quotation by Appellant's agents of the freight rate in question.

The solution turns upon the true construction of the Act to regulate commerce, and upon principles which have been deduced by the Courts and especially by the U. S. Supreme Court, from the provisions of the Act, wherefore oral argument is respectfully prayed.

TRABUE, DOOLAN & COX,
For Appellant.

86 Be it remembered that on the 5th day of January, 1910, at a Court of Appeals held at the Capitol, in Frankfort, the following order was entered:

I. C. R. R. Co.,
vs
HENDERSON ELEVATOR COMPANY.

Henderson.

Came parties by counsel and filed agreement and on motion appellee is allowed until February 1, 1910, to file brief.

The agreement referred to in the above order is as follows:

87 Kentucky Court of Appeals.

ILLINOIS CENTRAL RAILROAD CO., Appellant.
vs.
HENDERSON ELEVATOR CO., Appellee.

Agreement.

It is agreed that the Appellee in the above styled case may have until the 1st day of February, 1910, in which to file its brief, and that an order may be entered by the clerk granting the extension herein agreed upon.

ILLINOIS CENTRAL RAILROAD COMPANY,
By JOHN C. WORSHAM, *Atty.*
HENDERSON ELEVATOR COMPANY,
By CLAY & CLAY, *Attys.*

88 Be it remembered that on the 6th day of January, 1910, at a Court of Appeals, held at the Capitol, in Frankfort, the following order was entered:—

I. C. R. R. Co.,
v.
HENDERSON ELEVATOR COMPANY.

Henderson.

The Court being sufficiently advised appellee's motion for oral argument is overruled.

89 Be it remembered that on the 12th day of January, 1910, at a Court of Appeals held at the Capitol, in Frankfort, the following order was entered:

I. C. R. R. Co.,
v.
HENDERSON ELEVATOR COMPANY.

Henderson.

The Court being sufficiently advised the order refusing oral argument herein is set aside and oral argument granted at present term.

90 Be it remembered that on the 4th day of February, 1910, at a Court of Appeals, held at the Capitol, in Frankfort, the following order was entered:

I. C. R. R. Co.,
v.
HENDERSON ELEVATOR COMPANY.

Henderson.

This case came on to be heard, was argued by James W. Clay for appellee, and Edmund F. Trabue for appellant, and submitted.

91 Be it remembered that on the 4th day of May, 1910, at a Court of Appeals, held at the Capitol, in Frankfort, the following judgment was entered:—

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
HENDERSON ELEVATOR COMPANY, Appellee.

Appeal from Henderson Circuit Court.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and appellee recover of appellant ten per cent damages on the amount of the judgment superseded herein, which is ordered to be certified to said Court.

It is further considered that appellee recover of appellant its costs herein expended.

And on said date the Court delivered the following opinion, which is in words and figures as follows:

92 Court of Appeals of Kentucky.

MAY 4, 1910.

(To be Reported.)

ILLINOIS CENTRAL RAILROAD CO., Appellant,
vs.
HENDERSON ELEVATOR CO., Appellee.

Appeal from Henderson Circuit Court.

Opinion of the Court by Judge Nunn.

This appeal is from a judgment of the Henderson circuit court for $1,960.00 damages alleged to have been sustained under the following circumstances; Appellee was at the time of the alleged injury, and is now, a corporation created and doing business under the laws of the state of Kentucky, and was then, and is now, in the business of buying, handling and shipping grain. Appellant is a corporation created under the laws of Illinois, and operates a line of railroad through the states of Illinois, Kentucky and thence south, through other states, to the city of New Orleans, Louisiana. Its line of road passes through the city and county of Henderson, Kentucky. Appellee alleges that appellant is a common carrier of freight and passengers for hire and is engaged in interstate commerce;
93 that on August 20, 1906, appellant issued its tariff rate fixing the prices to be charged for shipping corn from Indiana and Illinois points through Henderson, Kentucky, to New Orleans, Louisiana, for export, and also its tariff of rates from points in Indiana and Illinois to Henderson, Kentucky, there to be reconsigned to New Orleans for export; that the rate so prescribed was twelve cents per one hundred pounds and went into effect September 1, 1906; that subsequently appellant issued a supplement to this tariff reducing the rate on corn shipped from points in Indiana and Illinois to Henderson, Kentucky, and Evansville, Indiana, there to be reconsigned to New Orleans for export, from twelve cents to ten cents per one hundred pounds. This supplement went into effect September 6, 1906. It was proved that, under both tariff rates, all shippers in Henderson, Kentucky, were authorized and permitted to ship corn from the points in Indiana and Illinois shown on the tariff rate to Henderson, Kentucky, paying the local freight from these points to Henderson, and if reconsigned from Henderson to New Orleans for export within one hundred and eighty days after its receipt in

Henderson, the shipper would be given the benefit of the through rate of ten cents per one hundred pounds from the points in Indiana and Illinois to New Orleans for export. It appears that this tariff rate was approved by the Interstate Commerce Commission, was posted and put into effect as required by the act of Congress regulating interstate commerce. Appellant, as was its custom, furnished appellee with a copy of this tariff schedule soon after it was
94 established. It appears that appellee was ignorant of any change in this tariff rate, until the date hereinafter named, and about the first of September, 1907, it purchased at these points in Indiana and Illinois a large quantity of corn for the purpose of re-sale. It had received a proposition from Hall-Baker Grain Co., of New Orleans, to purchase one hundred thousand bushels of corn to be delivered in New Orleans. To enable it to make terms of sale, it took the tariff rate which it had been furnished to the freight office of appellant in the city of Henderson, Kentucky, the place from which it made its shipments and where appellant was required to keep its tariff rate sheets posted, to ascertain if the ten cent rate had been suspended or changed. The agent informed him that none had been made, and he, with the agent, examined carefully to see if any other schedule had been posted, but could find none. They then examined the files in the office to see if any had been furnished the agent and not posted and none could be found, and for the purpose of ascertaining with more certainty whether any change had been made in this ten cent rate up to that time, he requested appellant's agent in Henderson to make inquiry of the proper authorities of his company as to whether the ten cent rate was still in force. These examinations and request were made on September 6, 1907. In compliance with appellee's request, appellant's agent in Henderson did write to its commercial agent in Evansville, Indiana, and received an answer from him September 9, 1907,
95 stating that the rate on such shipments was ten cents per one hundred pounds; that no change had been made in the tariff rate referred to, and appellant's agent in Henderson furnished appellee a copy of that letter. Having been furnished with information to the effect that the ten cent rate had not been altered in any way appellee answered Hall-Baker Grain Company's telegram stating a sale price of one hundred thousand bushels of corn to be delivered in New Orleans, freight prepaid. Appellee immediately informed appellant's agent in Henderson of this trade, which the agent booked and agreed to transport the corn at the rate named. After this trade had been made and appellee had obligated itself to ship the one hundred thousand bushels of corn, it received, on Sept. the 19th, 1907, a notice from appellant company that the tariff rate on such shipments had been increased from ten cents to thirteen and a half cents per one hundred pounds, and that such increase had been made in the schedule issued February 28, 1907, and went into effect April 1, 1907, and, notwithstanding, appellee had sold its corn on a basis of a ten cent freight rate per hundred pounds, it was required when it shipped to pay thirteen and a half cents per hundred pounds. Appellee alleged and proved that it would not have made the sale of the corn at the price it did if it had known the tariff rate had been

increased; that its loss on account of the increase was the amount named in the judgment; that its loss was not occasioned by any neglect or failure on its part, but was due solely to the negligence of appellant's agents and servants in failing to file with its local
96 agent or to post as required in its depot or station in Henderson or in any other place in that city where freight was received for transportation, any printed copy or copies of its schedule of rates changing its prior schedule furnished appellee, and in failing to give its local agent any notice or information that the rates had been changed. These facts were shown by appellee's president and appellant's agent in Henderson. The only witness introduced by appellant was its mail clerk in charge of the distribution of its tariff rates in Memphis, Tennessee. He stated, in substance, that he enclosed a tariff schedule in an envelope for Henderson, Kentucky, and placed it in a "bin" assigned to railroad mail and to which other employés had access. He did not put a stamp on the envelope and put it into the government mail box.

Appellant contends that the judgment should be reversed because the state court had no jurisdiction to try the action; that the Interstate Commerce Commission should have been applied to and asked to remedy the wrong, if any; that to uphold judgments obtained under circumstances like those surrounding this case, would have the effect to render the act regulating interstate commerce ineffectual and nugatory. It is well established by the opinions of the United States Supreme Court that when a common carrier makes its schedule of rates and files them with the Interstate Commerce Commission and that body approves and promulgates them as the act requires, the parties, the carrier and shipper, must observe them, and any known departure therefrom will subject them to a fine
97 of not less than one thousand nor more than twenty thousand dollars for each offense. (Plaquemines Tropical Fruit Co. vs. Henderson, 170 U. S., 511; Western Union Telegraph Co. vs. Call Pub. Co., 181 U. S., 92; T. & P. Ry. Co. vs. Mugg, 202 U. S., 242; T. & P. Ry. Co. vs. Abilene Cotton Oil Co. 204 U. S., 426; Southern Ry. Co. vs. Tift, 206 U. S., 428, and Armour Packing Co. vs. U. S., 209 U. S., 56.) This does not apply to the instanst case. There was no deviation from the rates as approved by the Commission which took effect April 1, 1907. The increased rate was paid by appellee as the act required, and appellee's action was not brought to recover the amount paid above the ten cents or for an unreasonable charge of freight rates. Its action is founded upon the idea that it was damaged by appellant on account of its failure to perform a manifest duty required of it by the act of Congress in failing to post in its office in Henderson, Kentucky, its changed tariff rate which took effect April 1, 1907, by which failure and wrong it was induced to enter into a contract with a third party to its damage.

The questions are: Can an action of this character be maintained in a state court? Would the enforcement of a judgment like the one in the case at bar, have the effect to render nugatory the Act with reference to interstate commerce, or the powers of the commission

created thereby? So closely related are these questions that it is impossible to consider one without at the same time stating facts and reasons applicable to the determination of the others. That
98 part of section 9 of the United States Statutes of 1901, applicable to the question, is as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction;"

It will be observed that this section only gives a person the privilege of seeking aid of the commission or bringing an action in a district or circuit court of the United States. That part of section 22 of the same Statutes, germane to the question, is:

"Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies;"

It is certain that at common law a party could bring an action in a state court to redress a wrong such as described in the petition in this case. In section 132, Bishop on Non-Contract Law, we find the following:

"Whenever the common law, a statute, a municipal by-
99 law, or any other law imposes on one a duty, if of a sort affecting the public within the principles of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered specially therefrom. Or, if the matter of the law involves only the interests of individuals, any one who has received harm from another's disobedience may have his suit against him for damages."

This is exactly in point. It is shown by appellee in this case that his damage resulted, not from an over or excessive charge of freight or a charge in excess of the contract price, but from the failure on appellant's part to perform a duty enjoined upon it by the act of Congress, to-wit, a failure to post the schedule of tariff rates as required by that act which is as follows:

"Such schedule shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected." (A part of section 6 as amended by act of the Fifty-ninth Congress.)

We are unable to see why a shipper who has sustained damages by reason of a common carrier's failure to comply with this act
100 cannot maintain an action for redress in a state court. He does not, in doing so, conflict with, abridge or alter in any way the powers granted by the act to the Interstate Commerce Commission, nor does he in any way violate the provisions of the act;

but, to the contrary, he tends to aid the commission in the proper enforcement of the law by making the common carrier more prompt in complying with the provisions of the act.

The case of T. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, was a case brought and prosecuted in a state court of Texas for the recovery of alleged unreasonable charge of freight, but the rate collected was the rate stated in the schedule filed with and approved by the Interstate Commerce Commission and published as required by the act regulating interstate commerce, and which it was the duty of the common carrier under the law to enforce against the shippers. The court in that case in considering the matter of jurisdiction of the state court and its right to enforce a return of the money collected above a reasonable rate, said:

"In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless the result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subse-
101 quent statute of its efficiency; in other words, render its provisions nugatory."

The court in that case, in view of the fact that the carrier only collected from the shipper the rate fixed in the schedule as established and published after approval by the commission, determined that the court did not have jurisdiction to pass upon that question until the matter was brought to the attention of the commission for a change of the rate. If any such proceeding was allowed, shippers who instituted actions and sustained them would be able to ship for a less rate than other persons and would render the purpose of the act ineffectual. The court said:

"For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to the reasonableness by the various courts called upon to consider the subject as an original question."

In concluding its opinion in that case the court said:

"Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must,
102 under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce."

As will be seen, the question before us was not before the court in that case nor in the case of T. & P. Ry. Co. vs. Cisco Oil Mill, 204 U. S., 449. The court closed its opinion in that case with these words:

"Whether by the failure to post an established schedule a carrier became subject to penalties provided in the act to regulate commerce, or whether if damages had been occasioned to a shipper by such omission, a right to recover on that ground alone would have obtained, we are not called upon in this case to decide."

From these authorities we conclude that the Supreme Court recognized the right of a shipper to enforce, in a state court, a claim for damages that is not repugnant to the statutes and the enforcement of which would not deprive the statutes of their efficiency. We
103 further conclude that the enforcement of appellee's claim in the case at bar would not have the slightest tendency in either of those respects, but, on the other hand, it is consonant with the enforcement of the act and will aid the commission with regard thereto.

For these reasons, the judgment of the lower court is affirmed.

Whole court sitting.

Clay & Clay for Appellee.

Trabue, Doolan & Cox, Jno. C. Warsham, J. L. Dorsey, for Appellant.

[Endorsed:] May 4-1910. I. C. R. R. Co. vs. Henderson Elevator Co.

104 Be it remembered that on the 28th day of June, 1910, there was filed in the office of the Clerk of the Court of Appeals Petition for writ of Error, and which is hereto attached and is as follows:

105 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
v.
THE HENDERSON ELEVATOR COMPANY, Defendant in Error.

Petition for Writ of Error and Assignment of Errors.

The above named Illinois Central Railroad Company, of the State of Illinois, conceiving itself aggrieved by the decision made and judgment rendered by the Court of Appeals of Kentucky in the cause of the above named plaintiff in error against the above named defendant in error in said court at its April Term, A. D. 1910, towit, on the 4th day of May, A. D. 1910, said Court being the highest court of the State of Kentucky and the court of last resort of said State for the hearing and determination of said cause, in which cause the plaintiff in error claimed a certain construction of the Act of Commerce approved March 3rd, 1887, entitled An Act to Regulate Commerce and the amendments thereof, and claimed im-

munity under the said Act and Article I, Section 8, Sub-section 3 of the Constitution of the United States from the claim made against it by the defendant in error, and the decision of said highest court of said State, towit, the said Court of Appeals of Kentucky, affirming the judgment of the Henderson Circuit Court from which the said case was appealed to the said Court of Appeals, was against the claim of the plaintiff in error and the right specially set up and claimed under the Constitution of the United States and Act of Congress aforesaid by the said plaintiff in error, the said right, as aforesaid, claimed by plaintiff in error being denied as aforesaid by said State Courts;

Presents herewith its assignments of errors and prays for a writ of error to issue out of the Supreme Court of the United States to said Court of Appeals of Kentucky to the end that the record in said matter may be removed to the said Supreme Court of
106 the United States, and the errors complained of by the plaintiff in error may be examined and corrected and the judgment aforesaid of the Court of Appeals may be reviewed and reversed.

EDMUND F. TRABUE.
Counsel for Plaintiff in Error.

Filed June 25, 1910.
HENRY S. BARKER,
Chief Justice, Court of Appeals of Kentucky.

Filed June 28, 1910.
NAPIER ADAMS,
Clerk, Court of Appeals of Kentucky.

[Endorsed:] Illinois Central Railroad Company vs. The Henderson Elevator Company. Petition for Writ of Error. Filed Jun-, 29, 1910. Napier Adams, C. C. A.

107 And on said date there was filed in the office of Clerk of the Court of Appeals, Assignment of Errors, and which is hereto attached and is as follows:

108 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
v.
THE HENDERSON ELEVATOR COMPANY, Defendant in Error.

Assignment of Errors.

Plaintiff in Error, Illinois Central Railroad Company, of the State of Illinois, feeling itself aggrieved by the findings and judgment of the Court of Appeals of Kentucky in the above entitled cause, comes by its counsel and assigns errors thereto as follows, towit:

I.

The Court of Appeals erred in holding and deciding that the State Courts of Kentucky had jurisdiction of this case; and in holding and deciding that the jurisdiction of the Interstate Commerce Commission and the United States Courts was not exclusive of the State Courts.

II.

The said Court of Appeals erred in holding and deciding that plaintiff in error was required by the Act of Congress entitled An Act to Regulate Commerce to keep a tariff sheet or sheets posted in the City of Henderson, State of Kentucky, the shipments in question being from points in the States of Indiana and Illinois to New Orleans in the State of Louisiana through Henderson, which was a station enroute and not the station of origin or destination of the corn shipped.

III.

The said Court of Appeals erred in holding and deciding that plaintiff in error was liable to pay to defendant in error the
109 sum claimed or any sum because its agent booked or agreed to transport the corn in question at the rate named, viz., the lower rate which was less than the published rate.

IV.

The said Court of Appeals erred in holding and deciding that plaintiff in error by representing the rate in question to be 10 cents thereby agreed or contracted to carry the corn at such rate at the time when it should be shipped; and in holding that defendant in error might recover through or by reason of such contract to carry at 10 cents, such rate of 10 cents being less than the published rate.

V.

The said Court of Appeals erred in holding and deciding that the loss sustained by defendant in error was due to the negligence of servants and agents of plaintiff in error in failing to file or post at Henderson the rate upon which the corn was shipped from Indiana or Illinois to New Orleans.

VI.

The said Court of Appeals erred in holding and deciding that to permit a recovery of plaintiff in error by defendant in error of the sum claimed in this case would not work a deviation from the rates published with and approved by the Commission which took effect April 1, 1907; and would not amount to a rebate given by plaintiff in error to defendant in error in contravention of the Act of Congress.

VII.

The said Court of Appeals erred in holding and deciding that to permit such recovery of the sum claimed would tend to aid the Interstate Commerce Commission in the proper enforcement of the Federal Law by making the common carrier more prompt in complying with its provisions.

110

VIII.

The said Court of Appeals erred in holding and deciding that Section 9 of the Act to regulate Commerce conferred upon defendant in error the right to maintain this action; and, also, in holding and deciding that Section 22 of the Act to Regulate Commerce preserved to defendant in error the right to maintain this action as a right existing at common law.

IX.

The said Court of Appeals erred in holding and deciding that the damage to defendant in error sued for in this case resulted from a failure to post in the City of Henderson aforesaid the schedule of rates aforesaid and from misrepresenting the rate, and not from charging a rate in excess of the contract rate or an excessive rate.

X.

The said Court of Appeals erred in refusing to hold and decide in accordance with the contention of plaintiff in error that under the Act of Congress aforesaid it, said plaintiff, had the right at any time thereafter, notwithstanding its erroneous representation of the rate in question to change the said rate upon thirty days' notice and advertisement, as permitted by the Statute, and, therefore, did not incur liability to said defendant for damages as the corn was then designed by defendant in error to be, and was shipped more than two months after such representation of said rate.

XI.

The said Court of Appeals erred in refusing to hold and decide in accordance with contention of plaintiff in error that the erroneous representation of the said rate could confer upon defendant aforesaid no greater rights than if said plaintiff had agreed or contracted, with said defendant to transport said corn at said rate so

111 represented, towit, 10 cents, and that defendant in error could not have sustained its claim on which it obtained judgment in this case on a contract to carry at said rate of 10 cents, which was less than the published rate and, accordingly, defendant in error could not sustain its claim herein on such erroneous quotation of said rate.

EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

Filed June 25, 1910.
HENRY S. BARKER,
Chief Justice Court of Appeals of Kentucky.

[Endorsed:] Illinois Central Railroad Company vs. The Henderson Elevator Co. Assignment of Errors. Filed Jun- 28, 1910. Napier Adams, C. C. A.

112 And on the said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error from the Supreme Court of the United States, and order allowing the writ and which is hereto attached, as follows:

113 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky, being the highest court of law or equity of the said State of Kentucky in which a decision could be had in the said suit between the Illinois Central Railroad Company of the State of Illinois, plaintiff, and the Henderson Elevator Company, defendant, wherein the plaintiff in error claimed an immunity, right and privilege under and in pursuance of the Constitution of the United States and especially Article I, Section 8, Sub-section 3, and the Act of Congress passed in pursuance thereof approved on the 3rd day of March, A. D. 1887 and the amendments thereto entitled an Act to Regulate Commerce, and the decision of said Court of Appeals of Kentucky was adverse to and against the right, privilege and immunity specially set up and claimed by the plaintiff in error under the said Constitution and Act of Congress and wherein was drawn in question the construction of the Statute aforesaid and the amendments thereof, a manifest error hath happened to the great damage of the said plaintiff in error, the Illinois Central Railroad Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 24th day of July, A. D. 1910, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to
114 the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 25th day of June in the year of our Lord, one thousand nine hundred and ten.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk of the United States Circuit Court,
Eastern District of Kentucky, at Frankfort.

Allowed by
HENRY S. BARKER,
Chief Justice and Presiding Judge
of the Court of Appeals of Kentucky.

[Endorsed:] Illinois Central Railroad Company vs. The Henderson Elevator Company. Writ of Error. Filed Jun- 28, 1910. Napier Adams, C. C. A.

115 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows:

116 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, Plaintiff in Error,
v.
THE HENDERSON ELEVATOR COMPANY, Defendant in Error.

Bond.

Know all men by these presents: That the Illinois Central Railroad Company, principal, and Edmund F. Trabue, surety, are held and firmly bound unto the above named Henderson Elevator Company in the sum of Three Thousand ($3,000.00) Dollars, to be paid to the obligee herein, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our successors, executors, heirs and administrators firmly by these presents:

Sealed with our seals and dated the 25th day of June, 1910.

[SEAL.] ILLINOIS CENTRAL RAILROAD COMPANY.
By EDMUND F. TRABUE, *Attorney.*
[SEAL.] EDWARD F. TRABUE.

Attest:
I. S. MANN.

117 Whereas, the above named Illinois Central Railroad Company of the State of Illinois has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered on the 4th day of May, 1910, by the Court of Appeals of Kentucky in the case of the said Illinois Central Railroad Company of the State of Illinois against the said Henderson Elevator Company:

Now, therefore, the condition of this obligation is such that if the above named Illinois Central Railroad Company, of the State of Illinois, shall prosecute its said writ of error to effect and shall answer all damages and costs that may be awarded against it if it fails

to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed in the presence of us this the 25th day of June, A. D. 1910.

I. S. MANN.
M. A. CURLEY.

Approved by me this the 25th day of June, 1910.

HENRY S. BARKER,
Chief Justice Court of Appeals of Ky.

Filed June 27th, 1910.

[Endorsed:] Illinois Central Railroad Company, vs. The Henderderson Elevator Company. Writ of Error Bond. Filed Jun- 28 1910. Napier Adams, C. C. A.

118 And on the 30th day of June, 1910, there was filed in the office of the Clerk of the Court of Appeals, the Original Citation, with proof of service endorsed thereon, and which is hereto attached as follows:

119 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Henderson Elevator Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of the State of Kentucky, the Court of Last Resort in said State, wherein the Illinois Central Railroad Company of the State of Illinois, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 25th day of June, A. D. 1910, and of the Independence of the United States the one hundred and thirty-fourth.

HENRY S. BARKER,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.

Copy of the within citation received, and service acknowledged this June 28th, 1910.

CLAY & CLAY,
Counsel for Defendant in Error.

[Endorsed:] Illinois Central Railroad Company, vs. The Henderson Elevator Company. Original Citation. Filed Jun- 30 1910. Napier Adams, C. C. A.

120 THE STATE OF KENTUCKY,
The Court of Appeals, ss:

In obedience to the commands of the within Writ of Error I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the case named in said Writ of Error, with all things concerning same.

In Witness Whereof, I have hereunto set my hand and affixed the seal of my office. Done at the Capitol, in Frankfort, this the 7th day of July, A. D. 1910.

[Seal Kentucky Court of Appeals.]

NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.

Transcript &c. $35.35.

[Endorsed on cover:] File No. 22,262. Kentucky Court of Appeals. Term No. 105. Illinois Central Railroad Company of the State of Illinois, Plaintiff in Error, vs. Henderson Elevator Company. Filed July 16th, 1910. File No. 22,262.

5

Supreme Court, U. S.
FILED.
NOV 11 1912
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 105

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS,
Plaintiff in Error,

vs.

HENDERSON ELEVATOR COMPANY,
Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

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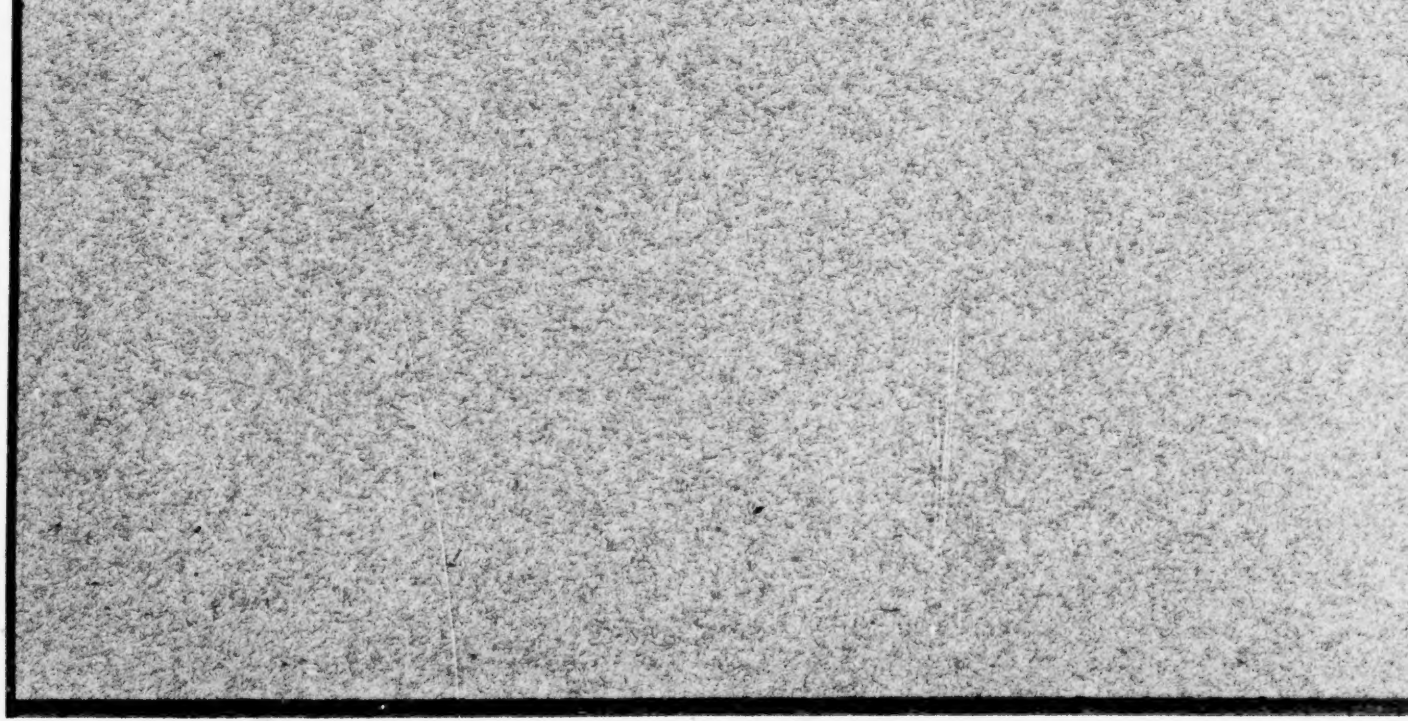

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STATEMENT OF FACTS.

This is a writ of error to the Court of Appeals of the State of Kentucky affirming a judgment of the Circuit Court of Henderson County for $1,960 with six per cent. interest from May 27th, 1909, and costs. (Rec., 13. Figures in parentheses refer to the pages of the printed record.)

The controversy involves the true interpretation of the Act to Regulate Commerce.

On April 22nd, 1908, the defendant in error, who was the plaintiff in the original action and will hereafter be referred to as the shipper, brought suit for damages for the sum of $1,960 on account of loss suffered in the sale September 13, 1907, to the Hall-Baker Grain Co. of 100,000 bushels of corn to be

delivered at New Orleans, La. The ground of the action was that a loss was caused by the local agent at Henderson, Ky., of the plaintiff in error, hereinafter referred to as the carrier, having misquoted to the shipper its freight rates a few days before the shipper closed its contract for the sale of the corn. The action was based upon negligence of the carrier in failing to file with its local agent or post in its depot in Henderson, Ky., any printed copy of a schedule of rates changing the prior schedule upon which the shipper had relied (5). Under the original tariff, I. C. C. No. A-5669 (26) effective September 1st, 1906, the export rate from certain local stations in Illinois and Indiana to New Orleans when reconsigned from Henderson, Ky., was 10 cents per hundred pounds and according to the shipper's evidence, this is the rate which was quoted to it by carrier's agent at Henderson (28, 29) when it made inquiry about the 10th or 12th of September, 1907 (29). The tariff which was in fact effective at that time was I. C. C. No. A-5994, effective April 1st, 1907, which made the rate upon reconsignments from Henderson, Ky., 13½ cents per hundred pounds (38-39).

The court overruled a demurrer to the petition setting out in substance the facts stated (8) and the carrier pleaded, first that the State Courts had no jurisdiction of the action, (9) traversed the material allegations of the petition, set up that it had charged the rate fixed by the schedule then in force and on file with the Interstate Commerce Commission (10) and charged negligence on the part of the shipper (11). The court refused to instruct the

jury in favor of the carrier or to instruct the jury that the shipper could not recover if the rate had been changed before the shipment of the corn, but instructed the jury that if the loss was due to the carrier's failure to have posted or on file in its office in Henderson, Ky., the freight tariff rate which it had in force from Indiana and Illinois points of origin to New Orleans, and the shipper had been injured by an erroneous quotation of the rate, the shipper was entitled to recover (15).

The instructions *totidem verbis* are as follows (15):

"At the close of the evidence the defendant moved the court to give the jury the following instructions:

A. The court instructs the jury to return a verdict for the defendant.

B. The court instructs the jury that the contract alleged by plaintiff having been made in September, 1907, for the shipment of the corn in December, 1907, even if made upon the basis of a ten cent rate, did not prevent the Railroad Company from changing the rate, and if the rate charged plaintiff was the rate applicable in December the jury cannot find damages because said schedule was not on file in September.

But the court refused to give either of said instructions offered by defendant, to which defendant at the time excepted.

The court on its own motion gave the following instruction:

'1. Gentlemen of the jury, the court instructs you to find for the plaintiff such an amount in damages as you shall believe from the evidence will fairly and reasonably compensate the plaintiff for the loss, if any, sustained by it by reason of the sale of the corn in question that

it made at the time complained of, if any, and which was occasioned and brought about by defendant's failure to have posted or on file in its office in Henderson, Ky., its freight tariff rate in question and by reason of any erroneous quotation of defendant of its freight rate from and to the points in question, of which plaintiff complains, not exceeding the sum of $1,960, the amount claimed in the petition.'

To the giving of the said instruction the defendant objected and excepted at the time. The above instruction given to the jury was the only instruction given, and those refused were all that were offered and refused."

The jury returned a verdict for the shipper for the amount for which judgment was subsequently entered.

A motion in arrest of judgment and for a new trial were overruled (13-14).

Attention is called to the fact that the shipments of corn originated at certain points north of Evansville in Indiana, at Poseyville and other country stations (25). The contract with the Hall-Baker Grain Company was made September 14th, 1907, but the grain was not shipped and was not to be shipped, until December of that year (32). The shipper in fact paid the rates in effect by the published tariff on file with the Commission, but under the judgment rendered below and affirmed by the Court of Appeals of the State of Kentucky, the shipper is made whole to the same extent as if the rate erroneously quoted to the shipper had remained in effect down to and including the time of the shipper's actual shipments.

Specification of Errors.

The plaintiff in error relies upon assignments of error Numbers 1, 2, 3, 4, 6, 8, 10 and 11 (50-51), which are as follows:

1. The Court of Appeals erred in holding and deciding that the State Courts of Kentucky had jurisdiction of this case; and in holding and deciding that the jurisdiction of the Interstate Commerce Commission and the United States Courts was not exclusive of the State Courts.

2. The said Court of Appeals erred in holding and deciding that plaintiff in error was required by the Act of Congress entitled An Act to Regulate Commerce to keep a tariff sheet or sheets posted in the City of Henderson, State of Kentucky, the shipments in question being from points in the State of Indiana and Illinois to New Orleans in the State of Louisiana through Henderson, which was a station en route and not the station of origin or destination of the corn shipped.

3. The said Court of Appeals erred in holding and deciding that plaintiff in error was liable to pay to defendant in error the sum claimed or any sum because its agent booked or agreed to transport the corn in question at the rate named, viz., the lower rate which was less than the published rate.

4. The said Court of Appeals erred in holding and deciding that plaintiff in error by representing the rate in question to be 10 cents thereby agreed or contracted to carry the corn at such rate at the time when it should be shipped; and in holding that de-

fendant in error might recover through or by reason of such contract to carry at 10 cents, such rate of 10 cents being less than the published rate.

6. The said Court of Appeals erred in holding and deciding that to permit a recovery of plaintiff in error by defendant in error of the sum claimed in this case would not work a deviation from the rates published with and approved by the Commission which took effect April 1, 1907; and would not amount to a rebate given by plaintiff in error to defendant in error in contravention of the Act of Congress.

8. The said Court of Appeals erred in holding and deciding that Section 9 of the Act to Regulate Commerce conferred upon defendant in error the right to maintain this action; and, also, in holding and deciding that Section 22 of the Act to Regulate Commerce preserved to defendant in error the right to maintain this action as a right existing at common law.

10. The said Court of Appeals erred in refusing to hold and decide in accordance with the contention of plaintiff in error that under the Act of Congress aforesaid it, said plaintiff, had the right at any time thereafter, notwithstanding its erroneous representation of the rate in question to change the said rate upon thirty days' notice and advertisement, as permitted by the statute, and, therefore, did not incur liability to said defendant for damages as the corn was then designed by defendant in error to be, and was shipped more than two months after such representation of said rate.

11. The said Court of Appeals erred in refusing to hold and decide in accordance with contention of plaintiff in error that the erroneous representation of the said rate could confer upon defendant aforesaid no greater rights than if said plaintiff had agreed or contracted, with said defendant to transport said corn at said rate so represented, to-wit, 10 cents, and that defendant in error could not have sustained its claim on which it obtained judgment in this case on a contract to carry at said rate of 10 cents, which was less than the published rate, and, accordingly, defendant in error could not sustain its claim herein on such erroneous quotation of said rate.

ARGUMENT.

The decision below restores the evil of rebates.

The effect of the judgment of the State Court is to give the shipper a lower rate than other shippers who had to pay for their transportation according to the published rates. It forces the carrier to pay the shipper a rebate from the lawful rate. The judgment of the court has of course the merit of publicity, but if it was the duty of the carrier to pay the shipper the money, it was also the carrier's duty to pay without suit, in which event there need have been no publicity, and an erroneous quotation of a rate or even a failure to post a rate in a station entitles a shipper to an abatement from the published charge, or what amounts to the same thing, a payment to him by the carrier which would put him in an equivalent position to that in which he would have been if he had paid the lower rate. The result, too, would be a voluntary rebate protected by the judgment of the court. This inevitably brings back again all of the evils of the rebating system from which the Interstate Commerce Act has effected so happy a deliverance. How can it be proved that the quotation of a rate was in fact erroneously made? The judgment below if sustained by this court opens up an easy way to break down the statutory rates effected by filing schedules with the Interstate Commerce Commission. It destroys the principle that all

shippers shall pay the same rates for transportation.

The present case is a particularly aggravated one in that upon the shipper's showing the misquotation of the rate occurred about the 10th or 12th of September, 1907 (29) while the shipments were not made, nor intended to be made, until December following (32), so that the effect of the decision below is to hold the rate open irrevocably for the benefit of the shipper for about three months, during all of which time other shippers had to pay the higher rate. In other words, although it is well established that an express contract on the part of the Railroad Company to hold the rate open during that period would have been illegal and void, a negligent misquotation of the rate or failure to post is given the effect of a valid contract. So far as the shipper was concerned, a promise to give him a lower rate could have been violated with impunity, but a mere misrepresentation of the rate or failure to post the tariff was made to protect him for an indefinite period. If the judgment below can stand, an effective way has at last been found to guarantee shippers against future changes of railroad rates, and the decision in *Armour* v. *U. S.*, 209 U. S., 56, approved in *Phila, etc., Co.* v. *Schubert*, 224 U. S., 603, 615, has become a dead letter.

A previous decision controls.

The carrier confidently relies upon the case of *Texas & Pacific Ry. Co.* v. *Mugg & Dryden*, 202 U. S., 242, in which the facts cannot be distinguished

from the case at bar. In that case an erroneous quotation was made of the rate applicable to the shipment and the coal shipped was sold at a price based upon this quotation, but it was held nevertheless no action lay on account of the carrier's having collected the rate prescribed by the published schedule of rates and charges.

Posting the tariff was not essential.

In *Kansas City Southern Ry. Co.* v. *C. H. Albers Commission Company*, 223 U. S., 573, 594 (1912), the court approved the ruling in the case of *Texas & P. R. Co.* v. *Cisco Oil Mill*, 204 U. S., 449, that posting was not essential to make rates legally operative, and was required only as a means of affording special facilities to the public for ascertaining the rates *actually in force*.

The case involved the validity of an agreement as to rates where no through rate had been established and the rate agreed upon was lower than established local rates.

In the course of its opinion rendered by Mr. Justice Van Devanter, the court said (p. 597):

> "The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discrimination and undue preferences, and to prevent special and secret agreements in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed."

In *United States* v. *Miller*, 223 U. S., 599 (1912), it was held that the posting of the tariff was not a

condition of its being legally effective even in a criminal prosecution for accepting rebates.

The shipper was absolutely protected against a misquotation of the rate by applying to the Interstate Commerce Commission. It was in no respects at the mercy of the carrier's local agent in ascertaining a matter of public record, and an inquiry of the Commission in regard to the rate would undoubtedly have resulted in a reply from one of their rate experts quite as obliging and much more accurate than that obtained from the carrier's local agent. Since the judgment of the Court of Appeals of Kentucky this matter has been made perfectly clear by subsequent legislation by Congress.

The meaning of the statute made clear by subsequent legislation.

In the case of *United States* v. *Freeman*, 3 How. (44 U. S.), 556, 564-5 (1845), the court said:

> "If it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. *Morris* v. *Mellin*, 6 Barn. & Cress., 454; 7 Barn. & Cress. 99."

In the case of *Cope* v. *Cope*, 137 U. S., 682, 688 (1891), the court had occasion to pass upon a series of Acts of Congress dealing with the subject of Polygamy in Utah. They said:

> "These several Acts of Congress, dealing as they do with the same subject-matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be

> regarded as legislative interpretations of the prior ones. *United States* v. *Freeman*, 3 How., 556, 564; *Stockdale* v. *Insurance Co.*, 20 Wall., 323."

The same principle is observed in *Johnson* v. *Southern Pacific Co.*, 196 U. S., 1, 21 (1904), in dealing with the Safety Appliance Acts, and in *Wetmore* v. *Markoe*, 196 U. S., 68, 77 (1904), in case of the amendment of February 5th, 1903, to the Bankruptcy Act in regard to alimony.

In *Tiger* v. *Western Investment Co.*, 221 U. S., 286, 309 (1911), it was also said:

> "When several Acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."

The present provision of the Act in the paragraph before the last of the sixth section of the Interstate Commerce Act as amended by an Act approved June 18th, 1910, 36 Stat. at Large 548, is as follows:

> "If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line

> or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

There are several safeguards provided in this paragraph; the request must be in writing, the statement must be in writing, there must be actual damage, and the penalty accrues to the United States. The act provides for the very contingency of a shipper's entering into a sale or other contract whereby the obligation arises to ship the freight at his cost. The evident intent of the Act is that there shall be no other remedy. It is also a legislative construction of the Act that previously no action would lie under the circumstances for which this remedy is provided. The intent of the Act appears very clearly from the Committee reports to the House and Senate in regard to this provision, and it would be difficult to make an argument against the judgment of the state court more powerful than that contained in the history of Section 8 of the Amendment of June 18, 1910, to Section 6 of the Act to Regulate Commerce.

Proceedings in Congress.

This amendment was first introduced in the Senate in Bill No. 6737 and in the House in Bill No. 17536.

The following paragraph is taken from the re-

port from Mr. Mann, from the Committee on Interstate and Foreign Commerce, to accompany House Bill No. 17536, to create an Interstate Commerce Court, to amend the Act entitled, "An Act to Regulate Commerce," approved February 4, 1887, as heretofore amended, and for other purposes, Report No. 923, 61st Congress, Second Session, page 9:

FURNISHING RATE ON APPLICATION.

"Section 8 proposes to add to section 6 of the existing Interstate Commerce Act a provision requiring a common carrier upon written request to state correctly to the applicant the tariff rate on a proposed shipment between stated places under a penalty for making an erroneous quotation of the rate. This penalty shall accrue to the United States and be recovered in a civil action brought by the United States. The bill does not provide for any redress to the shipper who may have suffered loss on account of an erroneous quotation of the tariff rate, for the reason that it has so far seemed impracticable to find any method of so doing without opening a loophole for the allowance of secret rebates in such manner as would be practically unprovable in criminal proceedings."

Messrs. Cummins and Clapp from the Committee on Interstate Commerce, in their report on the views of the minority on Senate Bill No. 6737, submitted the following in reference to Section 8: (Report 355, part two, Senate—61st Congress, Second Session, page 24):

"Section 8 of the bill is an attempt to make carriers more careful in quoting rates to proposed shippers. There have been many instances in which serious loss has been sustained by reason of the inaccuracy of the state-

ments of agents in giving information with regard to rates. It is impossible to award damages to the shipper for such misstatements, because it would be easy under such practice, by collusion between the carrier and the shipper, to give rebates and make discriminations. Therefore the remedy must be confined to a penalty imposed upon the carrier."

In the discussion upon the original Senate Bill, March 18th 1910 (p. 3372, Cong. Rec.) Senator Cummins of Iowa said:

"Section 8 of the Bill, I am glad to say, is exactly right. This is one of the things for which the people of the country have been asking for years, and I give this section of the Bill the same earnest approval as to the former sections of the bill, I have given my censure and criticism. The rate sheets of the United States are exceedingly complicated affairs, and there are very few people who are able to take them and determine what is the rate from one point to another. Railway companies either intentionally or unintentionally, through their agents, frequently misstate rates, so that proposed shippers are misled to their great injury in entering upon business engagements and making shipments upon the faith of rates that are stated to them by the agents of railway companies.

It is impossible to impose upon the railway companies any liability whatsoever in favor of the shippers for those mistakes, whether in good faith or otherwise, because the moment you give to a shipper the right to recover from a railway company damages on account of the misstatement of a rate, that moment you have opened the door to general discrimination and rebate, inasmuch as such liability will be at once taken advantage of by the railway companies to give to their favored shippers such

discriminations as they might be inclined to give. Therefore, the only way to proceed is to impose such a penalty upon railways, for a misstatement of a rate, as will induce the utmost caution. For that reason, this section provides that for every mistatement of a rate or a refusal to state a rate, which inflicts injury upon a shipper, the railway company shall incur a penalty of $250, to be recovered by suit of the United States and paid into the Treasury of the United States."

In the discussion upon the original House Bill, April 12, 1910 (Cong. Rec., p. 4588), Mr. Mann said:

"Mr. Chairman, there is considerable feeling on the part of shippers, that where a rate is quoted erroneously and they lose money by it, they should be permitted to recover from the railroad company the amount of their loss, and there is great justice in their claim. It is difficult to see why they should not have that right, because if the railroad company gives the shipper a rate of $1.90 and it turns out that the rate is $2.25 and the shipper has to pay the extra 35 cents, it would seem perfectly reasonable, where both were acting in good faith that the shipper should not be at that loss, he having depended upon the railroad company for his information, as he might properly do.

And yet we have worked over that matter as well as we could and have found no way, as yet, by which we thought we could give to the shipper the right to recover back any of his loss on an erroneous quotation, without opening the door wide to the granting of rebates. It is perfectly patent that if it is the law, permitting the shipper to apply to the railroad company for a rate and the railroad company may quote the shipper an erroneous rate and then require the shipper to pay the proper rate and then pay him back the difference between the erroneous rate quoted and the proper rate, that that gives

to every railroad and shipper, where they wish to combine, an opportunity to rebate *ad libitum*, and we have seen no way of making a specific provision, although it is quite extensively demanded by the shipping public; and it seemed to us that the only thing to do was to make the penalty against the railroad company for quoting erroneous rates, trusting to this that shippers who were mulcted in losses by reason of erroneous quotations, would call the attention of our proper legal authorities to the loss, and that the railroad companies would be sued for the penalties prescribed and thereby there would be an incentive to provide suitable means of furnishing correct rates. It ought not to be so that a man asking for a rate is required to rely upon the information of some little railroad agent who has before him only the tariff sheets with perhaps hundreds of amendments. That railroad agent, when asked for a rate, ought to be able to wire to the central office of the railroad company and ask for the rate, and there ought to be in that office experts who are able to give the rate on very short notice, and that is what we have endeavored to provide."

Mr. Madden, April 18, 1910 (beginning at p. 4937, continued page 4940), said:

"The subject of correct quotation of rates provided for in the Bill is one deserving more than a mere incidental notice. * * * Criticisms of this part of the Bill, based on the omission of a provision giving a remedy to the injured shipper, may be expected; but the reasons given in the report of the Committee should be considered. The reason there given is that it appeared impracticable to find any method of redress for the shipper without opening a loophole for allowances or secret rebates in such a manner as would be practically unprovable in criminal proceedings."

graph. And then follows two paragraphs, one of which is inclosed in quotation marks, which means that that is what the Senate proposes to add to section 6, and the other relates to the same subject-matter, but is another paragraph, not included in the term 'a paragraph,' not included in quotation marks, but is left afloat and alone by itself and never can become a part of section 6.

Section 6 is the provision that requires a railroad company to quote a rate on the demand of the shipper, and it contains this provision:

Provided further, that notwithstanding anything in this section contained, any person or company suffering damage in consequence of any violation of any of the provisions of this section shall have the right to recover such damage by suit against the carrier in any court of competent jurisdiction.

What does that mean? If I go to the railroad company and ask what the freight rate is—or take a better case, take the case that was tried in Chicago. The Standard Oil Company asked what the freight rate was to East St. Louis and was told that it was 6 cents a hundred. The rate on file was 18 cents a hundred. Under the provisions of this section, if the company gets a rate of 6 cents a hundred, and makes a shipment based on this information of 6 cents a hundred, and then is required to pay 18 cents a hundred, it is damaged to the extent of 12 cents a hundred, and can sue the railroad company for that 12 cents a hundred.

That is not opening the door wide to rebates, it is removing the whole side of the house. (Laughter.) And if the shipper under such circumstances, when he gets the wrong rate quoted to him—the lower rate—if he can sue for damages, what court in the land can say that the railroad company can not pay the damages without suit being brought? Since when and where is there in the law a provision that if I

owe a man money I can not pay him without being sued for it? And to take a step further, on the same reasoning, which is absolutely inevitable, I ask for a quotation, and get a lower quotation than the regular established rate; if I can sue the company for the difference, and if they can pay me the difference without suit, why should I be obliged to pay it in the first instance? Is it necessary, if the company can pay me back the money that I should pay them first?

It is absolutely repealing the Elkins anti-rebate law and every rebate provision in the existing law. I do not suppose that the senator who offered it as an amendment, if some senator did, intended that.

Mr. Hardy. Will the gentleman yield?

Mr. Mann. No; I ask that I be not interrupted. As I say, the door is wide open for rebates. We have been appealed to constantly by the shippers of the country, but even the shippers themselves did not propose anything so radical as that. They wanted to have the right to collect the damages by appeal to the Interstate Commerce Commission, but in my judgment even that opened the door for rebates, but this removes all the law against rebates. And if it goes to conference it will never be agreed to in that form. (Applause.)

We put in the bill an additional provision against rebates to prevent great companies of the country getting what they do now, rebates, under false claims for damages to their property. We put a provision in against that, strongly penalizing the man who would make a fictitious claim for damages through which he might secure rebates. That is left out of the Senate amendment."

House Bill 17536 was afterwards substituted in the Senate for Senate Bill 6337, and was referred to a conference committee composed of Senators Elkins

and Aldrich, managers on the part of the Senate, and Congressmen Mann and Wanger, managers on the part of the House. The Conference Committee made their report to the Senate and to the House on June 14, 1910 (Cong. Rec., p. 8134). The eleventh paragraph in the statement of the managers on the part of the House, accompanying the conference report on Bill 17536, relates to the provision regarding the quotation of rates, and is as follows:

> "Agrees to the provision requiring any common carrier subject to the act to quote a rate, as proposed by the House, instead of limiting this requirement to railroad corporations, as proposed by the Senate, *and strikes out the Senate provision authorizing shippers to sue the carrier for damages resulting from misquotation of rate*, and otherwise adopts the House provisions as to the amendments to section 6 of the act to regulate commerce."

The Rule Adopted by the Interstate Commerce Commission.

In the case of *A. J. Poor Grain Company* v. *C., B. & Q. Ry. Co., et al.*, 12 *Int. Com. Rep.*, 418, 421, 423 (1907), reparation was claimed upon the ground of misquotation of a rate by the agent of a railroad company. On this point the Commission, speaking through Mr. ~~Judge~~ Commissioner Harlan, expressed itself as follows:

> "It is urged on behalf of the complainant that the mistake of the freight agents of the Chicago, Burlington & Quincy Railway Company, in quoting to him a rate of 55 cents and thus leading him to make a purchase of the four carloads of wheat for shipment to destination upon the basis of that supposed rate, was an

act of negligence, involving the complainant in a considerable loss which the principal defendant ought to be required to make good to him.

The same contention has been made in other cases, resting upon similar facts, that have been heard before the Commission and the courts. But under the decisions of the Supreme Court of the United States in *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S., 242, 50 L. Ed., 1011, 26 Sup. Ct. Rep., 628, and *Gulf, Colorado & Santa Fe Ry. Co.* v. *Hefley*, 158 U. S., 98, 39 L. Ed., 910, 15 Sup. Ct. Rep., 802, the question of the liability of carriers for the mistakes of their agents in quoting freight rates to shippers seems not to be open to further discussion. In the former case an agent of the railway company, who ought to have been advised of the lawful rate, inadvertently quoted to the plaintiff a rate on a shipment then in contemplation that was lower than the published rate; in the later case an agent of the defendant railroad company not only named to the plaintiff a rate lower than the lawfully published rate, but inserted the erroneous lower rate in the bill of lading that was issued for the movement. In each case the Supreme Court of the United States held that the published tariff controlled, and that the lawfully published rate was the rate to be applied and collected on the shipment, notwithstanding the erroneous quotation of another and lower rate.

And of necessity no other conclusion was possible if the integrity of this regulative legislation is to be preserved. If a mistake in naming a rate between two given points is to be accepted as requiring the application of that rate by the carrier, the great principle of equality in rates, to secure which was the very purpose and object of the enactment of these several statutes, might as well be abandoned. If the act of a railroad clerk, whether through mistake or otherwise, in quoting a less than the lawful rate

or in inserting a lower rate in a bill of lading is to be held to require or to justify and excuse the substitution of that rate, on a particular shipment, for the lawfully published rate, the effectiveness of such legislation is at an end and its whole purpose destroyed. For past experience shows that billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes in the quotation of rates to favored shippers, while other shippers, less fortunate in their relations with carriers and whose traffic is less important, would be compelled to pay the higher published rates. * * *

But, it is urged, this doctrine involves a shipper in a loss when, as in this case, he relies upon the carrier, to advise him correctly of the rates. That is true. Occasional hardships may result from any inelastic rule of general application. The principle, however, is vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points, and that it shall be unalterable by any act or omission by the carrier or the particular shipper, or in any manner other than that provided by law. And when clearly considered there is no real hardship in being compelled to pay what the law has established as the lawful rate for transportation between two points. As well may it be said to be a hardship when a merchant is compelled to pay more of a duty on an importation of merchandise than he had been advised of by some customs official, or when a purchaser of real estate is afterwards compelled to pay a larger tax bill than some tax clerk had told him would be assessed for the year against the property so purchased. In common practice everyone relies upon clerks and agents for such information, but as a matter of law everyone is chargeable with a knowledge of the law's requirements in such

matters. So it is in the matter of railroad rates. While shippers rely largely upon the rates quoted by freight agents and billing clerks, the law charges them with knowledge of the lawful rates. And they will not be heard before this Commission to claim the benefit of a lower than the lawful rate on the ground that some railroad clerk has made a mistake in quoting a lower rate for a particular shipment. To permit shippers to impute negligence to carriers in quoting rates and on that ground to enjoy the rate quoted instead of paying the lawfully published rate would open a broad and ample way for the payment of rebates and for other unlawful practices and might, in its practical results, work a repeal of the essential feature of this legislation."

The court should adopt the ruling of the Commission.

A situation somewhat similar to the present one arose in the construction of a pension act in the case of *United States* v. *Alexander*, 12 Wall., 177, 180, (1870), the question being whether or not a statute granting pensions to widows of revolutionary soldiers had a retroactive operation. In the course of the opinion rendered by Mr. Justice Strong, the court said, in favor of the interpretation that the pension began at the time of the passage of the Act:

> "And this is made quite certain by the history of the legislation. The act of 1855, when first proposed, contained the following provision: 'And the pensions granted by this act, and those under the said section of the act of February 3d, 1853, shall commence on the fourth day of March, 1848.' This provision was intended to change the construction which the Commissioner of Pensions had given to the act

> of 1853, (30 Congressional Globe, 92), but it was stricken out, and the statute was enacted as it now stands. The intention of Congress was thus clearly manifested to adopt the construction of the act of 1853, which had been given to it by the Pension Bureau, and we are hardly at liberty now to interpret it differently."

In the present case the intention of Congress is equally obvious to adopt the construction of the Interstate Commerce Act as amended which had been given to it by the Interstate Commerce Commission for Congress struck out the Senate amendment intended to change that construction. Indeed for the court so to hold would be exactly in accord with the case of *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361 (1906), in which the following quotation is made from the opinion of the court rendered by the present Chief Justice (p. 401):

> "Now, without at all intimating that as an original question we would concur in the view expressed in the case last cited that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling and transporting as presented in the *Haddock* and *Coxe* cases, would have been confiscatory, and without reviewing the rulings made by the Interstate Commerce Commission in those cases and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least

until Congress has legislated on the subject. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with."

The Rule in the State Courts.

In the case of *Louisiana Ry. & Navigation Co.* v. *Holly*, 127 La. Rep., 615, (1911), the agent of the carrier had quoted the wrong rate and the shipper relying thereupon had settled with his customer who had since become insolvent, but the court held that no estoppel would operate against the carrier and that the tariff rate must be paid.

In the case of *Schenberger* v. *Union Pac. R. Co.*, 84 Kan., 79 (113 Pac., 433, decided Feb. 11, 1911), the syllabus by the court is as follows:

"The plaintiff made inquiry at the defendant's station at Wakefield, Kansas, for the freight rate on wheat in carload lots from Wakefield to New Braunfels, Texas, and told the agent that this information was desired in or-

> der to fix the price to a customer at New Braunfels. In answer to the inquiry the plaintiff was informed that the rate was 31 cents per hundred weight. Relying upon this information, the plaintiff fixed the price, and sold two carloads of wheat and shipped it over the defendant's line to New Braunfels, when an additional charge of 12½ cents per hundred weight was made and collected, making 43½ cents per hundred weight on the shipment, which was the regular tariff rate on file with the Interstate Commerce Commission. The mistake in quoting the rate was unintentional and not fraudulent. It is *held* that the provisions of the interstate commerce act govern the transaction, and that the plaintiff cannot recover."

The court held that the case was controlled by the cases of *Gulf, Colorado, etc., Railway* v. *Hefley*, 158 U. S., 98, *Texas & Pacific Railway Co.* v. *Mugg & Dryden*, 202 U. S., 242; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, *Armour Packing Co.* v. *United States*, 209 U. S., 56.

In the case of *Atchison, T. & S. F. Ry. Co.* v. *Bell*, ... Okla., ... ; 120 Pac., 987 (decided January 9, 1912), the syllabus by the court is as follows:

> "The agent of an interstate railway and carrier contracted with a shipper to transport certain shipments of live stock from a point in Arkansas to a point in Oklahoma. Said shipments had to pass over the lines of the initial carrier and of one other interstate carrier. The junction point of these railways was in Kansas. No through rate had ever been filed with the Interstate Commerce Commission and published as required by law, but the initial carrier had on file and published at the time an interstate rate on shipments from the point of origin of the

shipments involved to its junction point with the delivering carrier, and the delivering carrier had on file and published at said time a rate from the junction point to point of destination. The through rate contracted for by the initial carrier was less than the sum of the combined rates of the two carriers. *Held* that, by reason of section 6 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat., 380, [U. S. Comp. St., 1901, p. 3156]; as amended by Act approved June 29, 1906 (Act June 29, 1906, c. 3591, sec. 2, 34 U. S. Stat., at L. p. 586 [U. S. Comp. St., Supp. 1909, p. 1153], the special contract was void; and that the delivering carrier who on delivery of the consignment to it by the initial carrier had paid to the initial carrier its freight charges in accordance with its tariff on file regulating rates from the point of origin to the junction was entitled upon delivery of the shipments to the consignee to collect and receive from the consignee the freight charges so paid to the initial carrier and its freight charges in accordance with the tariff of the delivering carrier on file, prescribing the rate from the point of junction to the point of destination."

The following quotations are made from the opinion of the court:

"A mistake of the agent of a carrier in quoting to a shipper the rate on an interstate shipment lower than the authorized published rate does not authorize the shipper to receive from the delivering carrier the shipment upon payment of the contract rate, or where he has paid the tariff rate, exceeding the rate agreed upon to recover back the excess paid over the contract rate. *A., T. & S. F. Ry. Co.* v. *Holmes*, 18 Okl., 92, 90 Pac., 22. Nor does it prevent the carrier from recovering the authorized published rate. *Texas & Pac. Ry. Co.* v. *Leslie* (Tex. Civ. App.), 131 S. W., 824; *S. A. & A. P. Ry. Co.* v. *Clements & Anderson*, 20 Tex. Civ. App., 498, 49 S. W., 913."

Decisions similar to those from which we have quoted under the Interstate Commerce Act have also been made in the construction of state laws imposing similar requirements:

Haurigan v. *C. & N. W. R. R.*, 80 Neb., 132; 117 N. W. Rep., 100.

Savannah, etc., Co. v. *Bundich*, 94 Ga., 775.

The editor of the Harvard Law Review, Vol. 22, p. 58, citing the cases just noted, and *T. & P. R'y* v. *Mugg*, 202 U. S., 242, and reciting that the only case to the contrary is *M. P. R'y* v. *Crowell, etc., Co.*, 51 Neb., 293, says:

> "In the application of such statutes the intent of the contracting parties is immaterial.
>
> This is manifestly hard on the shippers, who may be induced to make shipments which they would not otherwise have made; but any other consideration would defeat the purpose of the statute."

The Present Rule in Kentucky.

The Court of Appeals of Kentucky is once more in line with the authorities which we have above cited from this Court and the courts of other states, for the case of *Ches. & Ohio Ry. Co.* v. *Mayesville Brick Co.*, 132 Ky., 643, which was urged upon the Kentucky court in the instant case, but ignored in the opinion of that court in the instant case (138 Ky., 220), has since been followed by the Kentucky court in *C. & O. Ry. Co.* v. *Morton*, 143 Ky., 201, and *Lou. & Nash. R. R.* v. *Coquillard, etc., Co.*, 147 Ky., 530, without even citing the instant case in the opinions of the court. Indeed, it would be difficult to find anything more convincing on the subject than

the opinion of the Kentucky Court of Appeals in the case of *Ches. & Ohio Ry.* v. *Maysville Brick Co., supra.*

The state court had no jurisdiction.

The basis of our plea to the jurisdiction of the state court is that the shipper sued to recover back a sum, the collection of which it claimed was a violation of the Act of Congress and, therefore, only the Commission and the federal courts would have jurisdiction.

T. & P. R'y. v. *Abilene, etc., Co.*, 204 U. S., 426.

Sou. R'y. v. *Tift*, 206 U. S., 428.

Van Patten v. *C., M. & St. P. R. Co.*, 74 Fed. R., 981, 982.

Sheldon v. *Wabash R. Co.*, 105 Fed., 785.

If the State Courts could entertain jurisdiction of the claim of a shipper to recover back part of an interstate rate paid by the shipper to the carrier, interstate rates would necessarily be demoralized by the divergent views taken by the courts of the different States, and all the evils which were remarked in *T. & P. R'y* v. *Abilene, etc., Co., supra,* would follow.

In *T. & P. Ry. Co.* v. *Abilene, etc., Co.* the decision denying the jurisdiction of a State court, or any other court, to entertain an action to recover back a rate before the Interstate Commerce Commission had passed upon it, was made in a case where the reasonableness of the rate was called into question, but the reasons given for the court's decision and the principles which the court expounded apply here.

This question may now be regarded as concluded by *Robinson* v. *Balti. & Ohio R. R. Co.*, 222 U. S., 506, reaffirming *T. & P. Ry. Co.* v. *Abilene, etc., Co., supra.* The logic of the situation in the instant case is the same. The shipper is really seeking reparation on the ground that he was overcharged upon an interstate shipment.

It will be observed that although the Interstate Commerce Commission has refused relief in cases of this kind, deeming that such relief would restore the evil of secret rebates, it nevertheless has taken jurisdiction of the cases. If the jurisdiction lies in the Interstate Commerce Commission and by appeal from them to the federal courts, it would be an unfortunate construction of the Interstate Commerce Act as amended which would give the State courts jurisdiction; indeed, the evil would be just as great as that of having the state courts pass upon the reasonableness of interstate rates.

The instant case is one more effort to overthrow the great policy of the Interstate Commerce Act that for the same service at the same time, all persons shall pay the same rates.

There was no duty to post these rates at Henderson, Ky.

The instruction of the court below in regard to the failure to post rates at Henderson, Ky., assumes that there existed the legal obligation upon the carrier to post the rates in question at Henderson. This is an inadmissible assumption. The rates are re-

quired to be posted or filed only at *points of origin*, or, probably, at *points of destination also*.

N. Y. Bd. of Trade v. *P. R. R. Co.*, 3 I. C. R. 417, 442.

N. O. Cotton Exch. v. *L. N. O. & T. R. Co.*, 3 *Ibid.*, 523, 525.

The shipments were not to be made from Henderson to New Orleans, and the rates for which the shipper inquired were not the rates from Henderson to New Orleans, but the shipments were to be made from Indiana and Illinois points and the rates were thus for transportation from those points to New Orleans via Henderson, and the posting of such rates was required to be made at the Indiana and Illinois points of origin and not at Henderson. The requirement of posting at Henderson in the court's instruction (15) was, therefore, immaterial to the case before the court but, nevertheless, was made the criterion of liability.

Respectfully submitted,

EDMUND F. TRABUE,
BLEWETT LEE,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

Office Supreme Court, U. S.
FILED.
DEC 2 1912
JAMES H. McKEN

NO. 105

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, *Plaintiff in Error*,

vs.

HENDERSON ELEVATOR COMPANY, *Defendant in Error*.

In Error to the Court of Appeals of the State of Kentucky

Brief of Defendant in Error.

JAS. W. CLAY,
Counsel for Defendant in Error.

Of Counsel:—
J. F. Clay,
A. Y. Clay.

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Supreme Court of the United States

OCTOBER TERM, 1912.

NO. 105

ILLINOIS CENTRAL RAILROAD COMPANY

. . . . . *Plaintiff in Error*

vs.

HENDERSON ELEVATOR COMPANY. . *Defendant in Error*

Brief of Defendant in Error.

STATEMENT OF CASE.

The Henderson Elevator Co., hereinafter called the shipper, is engaged in the business of buying, handling and selling grain, at Henderson, Kentucky, and adjacent territory.

The plaintiff in error, the Illinois Central Railroad Co., hereinafter called the railroad company, by a tariff of rates which went into effect Sept. 6, 1906, established a through rate on corn from certain points of Indiana and Illinois to New Orleans, La., for export of ten cents per one hundred pounds. Knowing from long experience that the corn raised around the points named had to be re-handled by an elevator before it was in fit condition for export, and that the elevators at Evansville, Ind., and Henderson, Ky., were the places this would be done, the Appellant formulated this tariff with special reference to those two places, and for the especial benefit of handlers and shippers

of corn at those two places. This is clearly shown by the tariff and supplements thereto, which are copied in full in the record. Supplement No. 2, effective Sept. 6th, 1906, contains the following:

> "The through rate to be applied from the above stations to New Orleans, La., (for export), will be ten cents per 100 pounds.
>
> Shipments will be billed to New Orleans at the through rate, or to Evansville, Ind., or Henderson, Ky., at the rate shown above, and when reconsigned to New Orleans (for export), will be waybilled from Evansville, Ind., or Henderson, Ky., at the difference between the through rate of ten cents per 100 pounds to New Orleans, La., and the rates shown above to Evansville, Ind., and Henderson, Ky."

The evidence shows that these tariffs were filed and published and copies were furnished the shipper, and that shipments of corn were made by it thereunder in the fall of 1906.

The evidence shows that about September 1st, 1907, the shipper had purchased a large quantity of corn in Southern Indiana and Illinois, at the stations shown on the tariff mentioned, and was negotiating for the sale of one hundred thousand bushels of this corn to the Hall-Baker Grain Co., of New Orleans, La., for export. As this corn had to be shipped to Henderson, handled, and if shipped to New Orleans for export, re-consigned at Henderson to New Orleans, and as the negotiations were based upon the price of the corn delivered at New Orleans, it became necessary to ascertain the freight rates from Henderson.

Mr. C. M. Bullitt, President of the Henderson Elevator Co., had charge of this part of the business. He took the copies of the above mentioned tariffs and went to see the local agent of the railroad company. He explained to this agent what he

wanted,—told him the price he would quote on the corn to the Hall-Baker Grain Co. would depend upon the freight rate, and asked the agent if the tariff of Sept. 6, 1906, had been changed and whether or not it was in full force and effect. The local agent made a thorough examination of his files; he and Mr. Bullitt together made a thorough examination of the tariffs filed in the freight office and elsewhere, and no tariff changing or cancelling the tariff mentioned could be found by either of them. Mr. Waltz, the local agent, states positively that no tariff changing this rate had been furnished him, and no other tariff had at that time been filed or posted at Henderson, and he and Mr. Bullitt both agree that he told Mr. Bullitt the tariff of Sept. 6th, 1906, was still in full force and effect.

Not satisfied with this, and knowing that the same tariff which controlled the handling of this grain to and from Henderson would be in force at Evansville, a more important shipping point, and where the Commercial Agent's headquarters were located, he requested the local agent at Henderson to write to Evansville, and ascertain if the tariffs mentioned were still effective. Mr. Waltz did this, and received a letter, under date of September 6, 1907, advising him that that tariff was in full force, and a copy of this letter was given to the shipper. The shipper had no notice whatever that any change had been made in the rate, and took these various steps in good faith, and with the real, earnest desire to ascertain what the rate really was. Satisfied from this investigation, and from the personal assurances of the local agent at Henderson, and the commercial agent at Evansville, that the tariff imposing the ten cent rate was in effect, and that the rate was ten cents per hundred pounds, the

shipper quoted to the Hall-Baker Grain Co. a price on the one hundred thousand bushels of corn, based upon the ten cent freight rate: the quotation was accepted, and a binding contract was entered into between them, by which the Henderson Elevator Company obligated itself to deliver the corn at New Orleans, for export, at the price named. The evidence shows that the price agreed on was not an offer made by the Hall-Baker Grain Co. which the Henderson Elevator Co. might accept or reject, but the price was named by the Henderson Elevator Co. based upon the freight rate, and was accepted by the Hall-Baker Grain Co. This contract was closed on Sept. 13th or 14th, 1907, and reported to and booked by the railroad company.

On September 19, 1907, the shipper received from the railroad company a letter from its Chicago office, bearing date the 17th of September, advising it that the tariff of Sept. 6, 1906, had been cancelled by a tariff effective April 1, 1907, under which the rate on such shipments had been increased from ten cents per hundred pounds to 13 1-2 cents per one hundred pounds.

This tariff of April 1st, 1907, is likewise formulated and gotten up with sepcial reference to Henderson and Evansville, and regulates the local rate from these various points in Indiana and Illinois to Henderson and Evansville. The local rate from these points to Henderson and Evansville is set forth in detail. It is then stated that the through rate from these sections to New Orleans would be 13 1-2 cents per 100 pounds. Then follows this paragraph:

> "Shipments will be billed to New Orleans at the through rate, or to Evansville, Ind., or Henderson, Ky.,

> the through rate of 13 1-2 cents per 100 pounds to New Orleans (for export) will be way-billed from Evansville, Ind., or Henderson, Ky., at the difference between the through rate of 13 1-3 cents per 100 pounds to New Orleans, La., and the rates shown above to Evansville, Ind., and Henderson, Ky."

Intended to fix and establish the rate for such handling of freight at Henderson and Evansville, if there were any places on the railroad company's entire system, where this tariff should have been published, kept on file and posted, it was at Evansville and at Henderson. Yet the evidence conclusively shows that it was not filed with the Henderson agent, or posted anywhere at the Henderson office, or notice given the Henderson agent of its adoption.

When it shipped the corn to fill the contract made, the shipper was compelled to, and did pay, the rate of 13 1-2 cents per 100 pounds, as a result of which it suffered a loss of 3 1-2 cents per 100 pounds on the 100,000 bushels of corn shipped, or a total loss of $1,000.00.

We now call the attention of the Court to the following provisions of the Hepburn Act, known as the "Act to Regulate Commerce." In the following quotations we italicize certain portions to emphasize them:

> "Sec. 6. (Amended March 2, 1889). Following section substituted June 29, 1906.) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and keep open to public inspection schedules showing all the rates, fares and charges for transportation *between different* points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been estabi-hed, the

several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier *shall* plainly state the *places between which property and passengers* will be carried, and shall contain the classification of freight in force, and shall also state separtely all terminal charges, storage charges, icing charges, and oll other charges which the Commission may require, *all privileges or facilities granted* or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rate, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, *and copies for* the use of the public shall be kept *posted in two public and conspicuous places in every depot, station, or office, of such carrier where* passengers or *freight*, respectively, are received for transportation, in such form that they shall be *accessible to the public and can be conveniently inspected.* The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act."

Section 22 contains this language:

"And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

The act prohibits the charging of a different rate from that fixed in the schedule under heavy penalties; gives the Interstate Commerce Commission and the Federal Courts jurisdiction in certain cases; and contains many other provisions.

Under these circumstances, the shipper instituted its common law action in the Henderson Circuit Court, not to recover the difference in the freight rate collected by the railroad, and the rate quoted by its agents; not to attack the reasonableness of the rate; not to obtain a rebate or recover an excessive rate; but to recover the damages caused by the negligence and care-

lessness of the defendants, its agents and servants in failing to inform its agents as to its tariffs of rates, and in failing to publish or file or post its tariff governing such shipment in its freight office or depot, or any other place where the same could be seen or inspected by the shipper or the public generally.

ARGUMENT.

I.—Upon the Case Under the Pleadings.

There is no question but what ,according to every principle of the common law applicable to such cases, upon every rule of negligence and liability therefor, upon every rule of human reason and common justice,—the shipper under the facts of this case is entitled to recover, and no court, having jurisdiction of the parties and of the subject matter, will undertake to deprive it of that right, unless compelled to do so by some mandatory provision of a constitutional statute.

We maintain that there is nothing in the Commerce Act that deprives the shipper of its right to recover in this case; and that no court, Federal or State, whose decisions could be regarded even as authority by this Court, has ever held that under the facts established by the evidence in this case, the party injured was without remedy, or could not recover.

Before entering upon a discussion of the case upon its merits, we ask the Court to examine and notice the pleadings in the case, as well as the evidence, when it will be observed that plaintiff in error has no standing at all, and is not in a position to rely upon the questions raised by it.

In the petition of the shipper it is alleged, and the answer of the defendant admits by failing to deny, that the schedule or tariff prescribing a rate of ten cents per one hundred pounds for shipments of the kind and character of this was the duly established rate in effect on the 6th day of September, 1906, and on

this question there is no dispute, either under the pleadings or under the evidence.

It is undisputed law that when a rate has been once established, that rate continues in full force and effect, and neither the carrier or the shipper have the right to depart or deviate from that rate. The rates published, filed and posted are the only rates which are in force or effect. Now, we contend that the rate of ten cents per one hundred pounds, established under the schedule and supplements which became effective on the 6th day of September, 1906, is the only tariff of rates on shipments of this character which was in effect either on the 14th of September, 1907, or in December, 1907, when it is said the shipment in question was made.

It is alleged in the petition, and admitted in the answer, that the schedule of September 6, 1906, fixing a rate of ten cents per hundred pounds was established, filed, published and posted as required by law. It is also alleged that the defendant demanded, and the plaintiff was compelled to pay, a rate of thirteen and a half cents per hundred pounds, and that this thirteen and a half cents per hundred pounds was demanded and paid under an alleged schedule, notice of which was given to the plaintiff on the 19th of September, 1907. The plaintiff does not state that this schedule imposing a rate of thirteen and a half cents per hundred pounds was the duly published, filed, posted and effective schedule in force at that time, or at the time the shipment was made.

The only paragraph of the answer relating to this schedule is the second paragraph, and this second paragraph is but a

traverse of certain allegations of the petition, with the exception of this one affirmative allegation:

> "But defendant says that it charged plaintiff the rate fixed by its schedule then in force, no matter what it was, and that it would have been guilty of a high misdemeanor to have charged any less or greater rate."

This allegation is but a conclusion of the pleader, because an allegation that a rate charged is a rate fixed by its schedule then in force does not attempt to and cannot be construed as an allegation that the rate alleged to have been established was established in the manner and form required by law. In order to make an allegation that a rate was an established rate, it is necessary to allege how the rate was established, and then leave it to the Court to say whether or not the rate is a regularly established rate. But even if the allegation be taken as sufficient, it is expressly denied in the reply.

There is no allegation whatever in the answer that this alleged schedule fixing a rate of thirteen and a half cents per hundred pounds was ever filed with the Interstate Commerce Commission, was ever promulgated or published by the Railroad Co., was ever filed in the office of the defendant company, either at Henderson or any other place, was ever posted, in the office at Henderson or any other place, or that this rate of thirteen and a half cents per hundred pounds was the same rate charged other shippers for similar services. The answer of the defendant does not even attempt to justify the charging of a rate of thirteen and a half cents per hundred pounds under the Act to regulate Commerce, or under any act or by any other authority.

If the rate of ten cents per hundred pounds prescribed under the schedule of Sept. 6, 1906, was established, as it is alleged in

the pleadings, in the manner and form required by law, and it stands as the rule until superceded by a schedule published, filed and posted in the manner and form required by law, then the burden rests upon the railroad company, of alleging that this rate of ten cents per hundred pounds had been superseded by a subsequent regularly promulgated, posted and effective tariff. No such allegation appears in the answer herein.

When we come to the evidence we find it stated by Mr. Malcolm Bullitt that on Sept. 19, 1907, he received notice from the railroad Company that the tariff had been increased from ten cents to thirteen and a half cents per hundred pounds, and received at that time what purported to be a copy of this tariff. Mr. George Waltz, the agent, stated that on Sepember 17, 1907, he saw a copy of this tariff, and there is introduced and read in evidence a certificate from the Secretary of the Interstate Commerce Commission showing that this tariff prescribing a rate of thirteen and a half cents per hundred pounds was filed in the office of the Interstate Commerce Commission on the 2nd day of March, 1907.

This is absolutely all the evidence in this record proving, directly or indirectly, the establishment of a rate of thirteen and a half cents per hundred pounds at any time, either before or after the contract was made with the Hall-Baker Grain Co., or before or after the shipment of the corn in December, 1907.

The filing of a tariff in the office of the Secretary of the Interstate Commerce Commission does not establish the rate It is a well known fact that frequently tariffs are filed in the office of the Interstate Commerce Commission which never become

effective, or which are withdrawn, or repealed, or superseded before they do become effective. But, even after a schedule is filed with the Interstate Commerce Commission, and the Interstate Commerce Commission approves that schedule, if no other steps were taken by the Railroad Company, that schedule so filed would never become effective, and neither the Railroad Company nor the public generally would be in any sense bound by it.

In addition to filing the schedule with the Interstate Commerce Commission, and thirty days prior to the time they take effect, it is absolutely necessary that thirty days' notice thereof be given to the public, and that those schedules be filed in the office of the various local stations affected thereby, if a carrier expects to bring itself within the provisions of the Interstate Commerce Act, and defend upon its provisions.

Not only was this schedule prescribing a rate of thirteen and a half cents per hundred pounds never filed with the local agent, or posted in the office of the local agent prior to the 17th of September, 1907, but there is absolutely no proof that this schedule whereby it is attempted to impose a rate of thirteen and a half cents per hundred pounds was ever filed with the local agent or published in any manner.

II.—Upon the Merits.

We have read with much interest the brief of able counsel for the railroad company, and will state in reply that whether or not we are mistaken in our views of this case, as to which the court must decide; it is very certain that the numerous cases cited by counsel do not sustain the position taken by them and in support of which they are cited. We concede, and have from

the beginning admitted, the soundness of almost the entire argument of counsel, and the correctness of the legal principles established by the cases cited.

In all the cases where a railroad company has been relieved from liability, and the shipper has been held bound by the rate, the tariff of rates had been published as required by the Commerce Act, or it did not affirmatively appear that it had not been done, and the court presumed it had been, while in this case it was not done, which fact is affirmatively pleaded, and conclusively shown.

All the decisions cited by counsel for the railroad company are based upon this deep, underlying idea,—that when a railroad complies with the provisions of the Act to Regulate Commerce, promulgates and publishes its tariff rates as in that act prescribed, that is presumptive notice to every shipper, and he cannot and will not be then heard to say that he was misled by the agent of the railroad company. He is given access to the schedule of rates, can see what it is for himself, and if under these circumstances he relies upon the statements of the agent, he does so at his peril. When, however, a railroad company establishes a rate, promulgates its schedule, publishes and posts it as required by law, and furnishes copies to the shippers, and a shipper goes to the place where tariffs should be filed and posted, and with the local agent makes a diligent search at the place the law requires them to be kept, searches the company's files, finds no schedule changing that rate, is assured by that agent, as well as the Commercial agent of the company, that the schedule exhibited by him has not been changed and is in full force and effect, and the further fact appears that no notice to

changing that rate has in fact been received, filed or posted,—when, in other words, the shipper does everything one could be expected to do, and then suffers a loss by reason of the negligent failure of the railroad company to comply with the mandatory provisions of a statute,—no court has ever held, nor do we believe will ever hold, that the railroad company is not liable, and the shipper is without remedy.

Quite a number of cases are cited by counsel as sustaining a contrary view, but when those cases are examined, they will be found to bear out the above statement, and to decide only the question, the correctness of which we concede. To show this we call attention to the following cases, all of which are cited in the brief of counsel for plaintiff in error:

In Tex. & Pacific Ry. Co. vs. Mugg, 202 U. S. 242, the statement of the case by Mr. Justice White shows the following facts were pleaded and found to exist:

> "And further, that if it ever quoted any such rate to appellees, such quotation was a violation of the Interstate Commerce Act, and was a lower rate than the interstate rate in effect at the time shipment was made, *which had been duly published, printed and posted in its depot and stations as required by the terms of the act.*"

In Gulf, &c., Ry. Co. vs. Hefley, &c., 158 U. S. 98, the statement by Mr. Justice Brewer shows the following:

> "The agent refused to deliver without payment of $100.00, that being the amount of charges due at the rate of 84 cents per 100 pounds. *This was the rate named in the printed tariff sheet posted in the railroad office at Cameron.*"

In Armour Packing Co. vs. United States, 209 U. S. 56, the statement by Mr. Justice Day shows that the railroad company

"*had filed, published and posted in accordance with* the acts of Congress the rates of shipment of the character in question."

In T. & P. Ry. Co. vs. Abelene Cotton Oil Co., 204 U. S. 426, the statement by Mr. Justice White shows:

> "Besides a general traverse, the railway company defended on the ground that the shipments were interstate, and were, therefore, covered by the act of Congress to regulate commerce. It was averred that, as the rate complained of was the one fixed in the rate sheet which the company *had established, filed, published and posted*, as required by that act, the State court was without jurisdiction," &c., &c.

In Sou. Ry. Co. vs. Tifft, 206 U. S. 428, the statement by Mr. Justice McKenna shows:

> "The appellants took the steps required by the interstate commerce act to put the advanced rate into effect."

In Kansas City S. R. Co. vs. Albers Com. Co., 223 U. S. 573, Mr. Justice VanDevanter stated the case and delivered the opinion, in which it appears that the tariffs or schedules in question were regularly printed, *and copies sent to the freight offices of the railroad company* at Kansas City and other points, *and were there kept open to public inspection*, the only failure being that they were not posted in conspicuous places in these offices. The mere failure to post does not destroy the effectiveness of the tariff, provided it is published and filed in the freight offices affected, and there kept open for public inspection. In that case, however, the Court said:

> "To avoid any misapprehension in respect of the character of the liability sought to be enforced in this case, we deem it well to repeat that there was no claim of any right to reparation or damges under the interstate commerce act, * * * *, but only an attempt to en-

> force a supposed liability for a breach of the special agreement."

The case of United States vs. Miller, 223 U. S. 599, does not bring within its purview the instant case. Those cases were based upon criminal prosecutions not seeking to charge the carrier with any liability, civil or criminal, but charging shippers with having knowingly solicited, accepted or received a rebate or commission at a less rate than that named in the tariffs published and filed by such carrier, as is required by the act to regulate commerce. The only question there presented was whether the indictment was fatally defective by its failure to charge that the tariffs alleged to have been violated were *posted* as required by law. The Court, Mr. Justice VanDeventer writing the opinion, simply held that the mere failure to post was not a condition to making a tariff legally operative, where it appeared that the same had been promulgated, filed and published.

In Texas & P. R. Co. vs. Cisco Oil Mill, 204 U. S. 449, the Court, speaking through Mr. Justice White, said at page 452:

> "Whether, by the failure to post an established schedule, a carrier became subject to penalties provided in the act to regulate commerce, or whether, if damage had been occasioned to a shipper by such omission, a right to recover on that ground alone would have been obtained, we are not called upon in this case to decide."

In the case at bar it does not appear that the schedule in question was promulgated, filed, published or distributed, but on the contrary it affirmatively appears that it was not, and was not alone on file in the office at Henderson, but that neither the agents of the carrier, nor the shipping public, ever had any notice or knowledge of it, express or implied. Up to the time of the decision in the Cisco case, the questions presented in this

case had never been presented to or passed upon by this court, they were not presented in that case, and they have never been presented in any subsequent case. We, therefore, say that in no case has this Court ever held that where the carrier has failed to file and publish its schedule of rates, and by reason of such omission damage has been occasioned a shipper, that such shipper would not have a right to recover.

We admit, and such admission in no sense weakens our case, that if the carrier had brought itself within the terms of the act to regulate commerce, and had complied with the terms of that act by filing and publishing its schedule of rates as provided in that act, then under the terms of the act and the decisions cited, there would be no liability, and the shipper would be without recourse. Its negligent failure and omission to do this is the direct and proximate cause which produced the damage, and the loss to it was the direct and proximate result of this negligent and unlawful act.

There can be no question upon the proposition that if the carrier in this case had filed the schedule of April 1st, 1907, in its office at Henderson, or published it as contemplated by the act, with the unusual precaution taken by the shipper as here shown, it would have been found and the loss complained of would never have occurred.

Counsel also cited as bearing on the question three decisions of the Court of Appeals of Kentucky, viz: C. & O. Ry. Co. vs. Maysville Brick Co., 132 Ky. 643; C. & O. Ry. Co. vs. Morton, 143 Ky. 201; and L. & N. R. R. Co. vs. Coquillard Wagon Works, 147 Ky. 530. An examination of the opinion of the Court of Appeals of Kentucky in these three cases will show

that in each of them the schedule or tariff of rates in questio
was published, filed and posted as required by law, and wer
open to inspection by the shipping public at the points where th
various transactions took place. All of these decisions are i
direct line with the decisions of this court and conclusively sho
that the Court of Appeals of Kentucky recognized the vast di
ference existing between the facts in these cases and the fac
in the case at bar.

We deem it unnecessary to discuss at any great length th
question of the statute in question, having been made clear b
subsequent legislation or by the discussion upon bills pending i
Congress amending or attempting to amend the act in questio
All those acts and discussions were taken up in an effort to r
lieve the shipper of the seemingly harsh burden placed upon hi
by his having to stand the loss occasioned by an agent of th
carrier in misquoting or deviating from the established rat
To relieve the shipper of such burden would unquestionably ope
the way to fraudulent and preferential practices. In this ca
as we have repeatedly stated and endeavored to show, it is n
a question of a mistake of the agent or a misquotation of rat
by any agent of the carrier, but it is a question of the failu
of the carrier to do that which the act to regulate commer
required it to do in order to protect itself and relieve it fro
damages at the hands of the shipper injured by reason of
failure.

It is not claimed that any contract was made in this ca
to carry this freight at less than the rate established by the l
gally effective and published tariff, but that by the negligence
the carrier in failing to file and publish its tariff, the shipper w

induced to make a contract with another and third party, which it would not have made if the carrier had complied with the duties and obligations it owed, under the law, to the shipping public, by reason of which it suffered the loss.

It is contended that the carrier might have charged the rate between the time the information as to the rate was given and the time the shipment was actually made. A sufficient answer to that position is, that between those dates no change was made. A shipper may under he law be required to assume the risk of future changes made in a legal and proper manner in an established schedule, but he is not required to assume the risk of an increase already made and which had been made six months previously, but which rate the carrier negligently failed to file, publish or give notice of. The evidence shows that this contract would not have been made with the Hall-Baker Grain Co. if the shipper had known the rate was 13 1-2 cents instead of 10 cents; the shipper would have known this if the carrier had complied with its legal obligations, and the shipper's loss was because of the negligence of the carrier.

If the rate had not already been increased, and after the contract was made and before shipment the carrier had increased the rate in the manner required by law, then the shipper might have done one of several things. A rate can only be changed on thirty days' notice. If, after September 9, 1907, the carrier wanted to increase this rate, the shipper, in view of what transpired between its president and officers and agents of the carrier, would likely have received actual notice of such change thirty days before it went into effect. Interested as he was, he would certainly, as an ordinarily prudent business man, keep fully ad-

vised by visits to the depot and inspection of the duly filed and published tariffs. If he found a tariff increasing the rate on the contracted shipment, he would have thirty days from the time it was promulgated to the time it went into effect to protect himself. During that time he might arrange to fill his contract and ship the corn before the increased rate became effective. He might explain to his customer the fact of the intended increase and be relieved from carrying out the contract. He might, before the rate became effective, take up the question with the carrier and the Interstate Commerce Commission, explain the situation and procure a rescission of the increased tariff, or a suspension of it to a time beyond the date of his shipment. There were many ways by which he might have protected himself from loss. If none of them should be successful, the carrier would at least be in a position where it could plead that it was not its fault; where it could plead that it had proceeded in a legal way; had been guilty of no negligence, or any act by which the shipper might have been induced to make the contract.

How different is the case as here presented. At a time when the ink had hardly dried on the contract with the Hall-Baker Grain Co., and in five days thereafter, the shipper is notified,—not that in thirty days the rate will be increased,—but he is notified that this increase was made five or six months before has been effective that long, and is now in full force and effect. What could the shipper do? He is deprived of the usual thirty days in which he might carry out his contract. He cannot obtain relief from the purchaser. It is too late to appeal to the Interstate Commerce Commission, because the rate has already

gone into effect. There is absolutely no way to protect himself, and without any fault on his part, but through the sole fault of the carrier, he must suffer a loss of one thousand nine hundred and sixty ($1,960.00) dollars unless the courts of the land make the loss fall on the carrier, where it belongs under the facts of this case.

It is also contended that if the shipper is awarded the relief sought in this case, an effective method will have been found whereby the old evil of rebates will have been restored. We do not see that such would be the result of awarding the relief sought. Public policy and the law of the land require that freight rates should be uniform and that one shipper should not be enriched at the expense of another. Public policy and the law of the land also require that carriers and persons generally shall be held responsible for their negligent acts and their failure to comply with statutory obligations whereby others are injured. We would not return to the old conditions where success or failure do not depend so much upon individual effort as upon membership in the favored class; nor would the satisfaction of the shipper's loss here in anywise enrich him or deprive others of their rights. There is absolutely no proof in this case that any other shipper ever paid or was called upon to pay the increased rate; if he had been so called upon and had actually paid the same, such shipper would at least have had knowledge of the fact that such rate was in force and such knowledge would have enabled him to base his sales upon that rate and thus prevent a loss resulting. Here the sale was based upon a ten cent rate and the recovery by the shipper of the $1,960.00 loss suffered by it would but place it upon an equality with other

shippers and handlers of grain. Nor is this all:—if any other shipper desiring to contract corn or grain for export had applied for a rate at the same time or prior to the application of the Henderson Elevator Co., it would have been given identically the same rate as that quoted to the Henderson Elevator Co., for the reason that that rate was the only rate in force, according to the filed and published tariff, notice of which had never been given to the agent of the carrier, the shipper in question, or to the public generally. Neither the shipper nor the agent could have had any knowledge of any other tariff than the one establishing the ten cent rate, because no other tariff had been published or filed and notice of no other tariff had been given.

It is also argued that the tariff in question was not required to be filed at Henderson, and that such tariffs are only required to be posted or filed at points of origin. It is clearly held in the cases cited and in all other cases where the question has been presented, that the carrier is required to publish and file its tariffs at every station, which is directly or indirectly affected by it.

Re Passenger Tariffs, 2 I. C. R. 445.

N. O. Cotton Exchange vs. Railroad 3 I. C. R. 525.

Railroad Co. vs. Hefley, 158 U. S. 98.

Armour vs. United States, 209 U. S. 56.

We have heretofore shown how directly the tariff in question affects the business at Henderson, and do not see how there can be any question about the proposition that it should have been filed and posted there. But for the sake of argument, granting that this schedule should not have been posted at Henderson, there is absolutely no allegation in the pleadings in this case, and not a syllable of proof in this case, showing that the

schedule under which it is attempted to prescribe a rate of thirteen and a half cents per hundred pounds was ever filed in any office of the Illinois Central Railroad Company or promulgated or published in any manner.

Jurisdiction of State Court.

The act provides that where a suit is brought involving a question of unreasonableness of rate, or a question of discrimination in rates, the Interstate Commerce Commission and the Federal Courts have jurisdiction. This action, hoewver, is upon neither of these grounds. This is a case, as we have shown, based upon the common law right to recover damages for the negligent act of another. The defendant attempts to excuse its negligence, and relieve itself from liability, by virtue of the Commerce Act. If that act relieves it from liability, then the plaintiff's case must fail, not because the state court had no jurisdiction of the case, but because the act abrogates the common law. In such case, however, the state courts have the right to construe the Federal statute relied upon, and pass upon the question as to whether that statute deprives the plaintiff of the right of recovery which he would have but for the statute. The state court also has the right to Construe the Federal Statute relied on as a defense, for the purpose of determining whether the person relying upon its terms has brought himself within the protecting influence of the statute by a compliance with its terms. The State Court is bound by the Federal Statute, but it has the same right to construe it that the Federal courts have.

The jurisdiction of the state courts of cases arising under the laws of the United States is concurrent with that of the Fed-

eral Courts, save and except where such jurisdiction is expressly prohibited. Even before the adoption of the constitution of the United States Alexander Hamilton in the Federalist used this language:

> "When in addition to this we consider the state governments and National Government as they truly are in the light of kindred systems and as part of one whole, the inference seems to be conclusive that the state courts would have concurrent jurisdiction in cases arising under the laws of the Union where it was not expressly prohibited."—(Federalist No. 82.)

The above quotation from the Federalist is quoted with approval by Mr. Justice Harlan in the case of the Plaquemines Tropical Fruit Co. vs. Henderson, 170 U. S. 515. The case just cited shows conclusively that the state courts have concurrent jurisdiction with the United States Courts in the enforcement of the laws of the United States, save and except in those cases where Congress has clearly expressed by unmistakable language the intention that the jurisdiction should be exclusively in the Federal Courts.

Section 711 of the United States Statutes provides in what cases the Federal Courts shall have exclusive jurisdiction, and the exclusive jurisdiction of questions involving Interstate Commerce laws is not by this section delegated to the Federal Courts. It is true that the Federal Congress has the exclusive right to regulate interstate commerce, and has the right in the Statutes to regulate interstate commerce to confer exclusive jurisdiction upon the Federal Courts, but until it is so conferred the state courts have the same right to enforce the Interstate Commerce law that the Federal Courts have.

See also Western Union Telegraph Co. vs. Call Publishing Co., 181 U. S. sec. 92.

Instead of there being an expressed intention on the part of the Federal Congress to confer exclusive jurisdiction in questions of this kind upon the Federal Courts, there is a clearly expressed intention that such should not be the case.

Section 8 of the Interstate Commerce Act provides in part:

> "That in case any common carrier subject to the provisions of this Act should do, cause to be done, or permit to be done, any act, matter or thing in this Act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby, to the full amount of damages sustained in consequence of any such violation of the provisions of this Act."

Section 9 of the same act provides that any person injured may appeal to the Interstate Commerce Commission, or may institute action for the recovery of such damages in the Federal Court, but it does not say that such person *shall* institute action in the Federal Court, or that the Federal Courts *shall* have exclusive jurisdiction of civil actions for the recovery of such damages. Instead of giving the Federal Courts exclusive jurisdiction, Section 22 of the Act contains this provision:

> "And nothing in this Act contained shall in any way abridge or alter the remedies now existing by common law or by statute, but the provisions of this Act are in addition to such remedies."

Congress could have had but one idea in inserting in this Act the language just quoted, and unless it is held that the state courts have concurrent jurisdiction with the Federal Courts of questions of damage under the Act, then this language of the

Federal Congress is without meaning, and has no place in the Act at all.

In the brief of counsel for Plaintiff in Error, the case of Texas & P. R. Co. vs. Abelene Cotton Oil Co., 204 U. S. 426, cited as an authority upon the position that the Federal Court has exclusive jurisdiction of the question involved in this case. Instead of that decision supporting the position of the plaintiff in error, it is a direct and positive authority upon the proposition that the state courts have jurisdiction to enforce the provisions of the Inter-state Commerce Act concurrent with the Federal Courts.

That case was a suit involving the question of the reasonableness of a rate prescribed by a schedule which had been filed by the Railroad Company with the Inter-state Commerce Commission, and posted as required by that Act. The case originated in the state courts of Texas, and the state court found as a fact that the schedule had been published, filed and posted as required by the provisions of the Act, and was in full force and effect, but held that the rate prescribed by the schedule was excessive and exorbitant, and should not for that reason be enforced. The Supreme Court of the United States held that when a rate had been established, the schedule had been filed with the Interstate Commerce Commission, and published and posted as required by that Act, neither the Federal Court nor a state court had any jurisdiction to attack the reasonableness of that rate without first pursuing the remedy prescribed by Congress, and that was by filing a complaint with the Interstate Commerce Commission. This complaint could not be filed anywhere else except with the Interstate Commerce Commission,

and neither the Railroad Company nor the shipper could appeal to the courts without going through this procedure. We have shown that this is not and cannot be construed as an attack upon an established rate on the ground that it is excessive, but it is a proceeding to recover damages by reason of the negligence of the defendant, not only in failing to comply with the Inter-state Commerce law by publishing its schedule of rates, but for violating the rules of ordinary prudence in failing to give its agents notice of its schedule. By reason of which the plaintiff made a contract, and on account of which it lost the sum of one thousand nine hundred and sixty ($1,960.00) dollars. If we wished to attack the rate of thirteen and a half cents per hundred pounds as being unreasonable, it would be necessary to file a complaint with the Interstate Commerce Commission, and have that rate set aside upon that ground. We do not attack the rate of thirteen and a half cents per hundred pounds. We do not know whether that rate is reasonable or unreasonable, and we do not care whether that rate is reasonable or unreasonable. We simply say that it was not a rate established as required by law, and that it had no binding force or effect upon this shipper either at the time the contract was made by it with the Hall-Baker Grain Co., or at any other time. And that under the facts in this case the railroad company had no right to collect a rate of thirteen and a half cents per hundred pounds, or, if it did have such right, it is responsible in damages because of the negligence complained of.

In the Abelene Cotton Oil case above citel the Court, construing the quoted part of Section 22 of the Act, said:

"This clause, however, cannot in reason be con-

> strued as continuing in shippers a common law right the continued existence of which would be absolutely inconsistent with the provisions of the Act. In other words, the Act cannot be held to destroy itself. The clause is concerned alone with the rights recognized in, or duties imposed by the Act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the Act should be regarded as cumulative when other appropriate common law or statutory remedies existed for the redress of the particular grievances or wrong dealt with in the Act."

According to this construction, then, when the Federal Congress gave to the shipper the right to institute his complaint for damages for a violation of the Act before the Interstate Commerce Commission, or before the Federal Courts, that was a course which he might take, but it would not take away from the shipper the right to pursue his remedy in the state court, but the right to bring the action in the Federal Court, or before the Interstate Commerce Commission was, in addition to his right to institute his action in the state court, which was in no sense taken away.

In the case of Galveston, &c., R. Co. vs. Wallace, 223 U. S. 481, it was held that a state court may enforce a right of action arising under an act of Congress.

It is a well recognized rule of the common law that there is no wrong without a remedy, that a party guilty of a violation of the law whereby another is injured is responsible in damages to the injured party, and this is true whether the law be a state or a Federal law, and any court having jurisdiction of the parties has jurisdiction of the action unless that jurisdiction is taken away by some express statute, and unless exclusive jurisdiction of the case is placed in some particular court. The Circuit Courts

of Kentucky are courts of general jurisdiction, having jurisdiction of all civil actions where the amount in controversy, exclusive of the interest and costs, is above fifty ($50.00) dollars, except in those cases where exclusive jurisdiction is given to some other court. Exclusive jurisdiction of violation of Interstate Commerce law, or rather recovery of damages for such violation, is not given to any other court, either by State or Federal laws, and even if it were given, the petition in this case is not only based upon the violation on the part of the railroad company of the ordinary requirements imposed upon it, not only by the Interstate Commerce law, but by the public policy of the State and of the Nation, namely, the requirement that its agents and representatives should be furnished with information upon which they might be able to transact the ordinary business of the Railroad Company in its dealings with the public.

Except to the extent changed by the Statute, and based upon the superior rights of the public, a railroad company is just as much bound by the acts of its agent as any other person, natural or artificial. It is just as much the duty of the railroad company to furnish its agents information upon which to conduct its business as it is the duty of any person, natural or artificial. When a railroad company establishes a rate and authorizes its agents to make contracts under that rate, that authority continues until it is withdrawn in the method and manner pointed out by law. If, before that authority is withdrawn in the manner pointed out by law, the railroad company, through its agent, makes a contract with one of its shippers, it is alike binding upon the railroad company and upon the shipper, unless the contract is prohibited by public policy and the law of the land. There is

no law prohibiting a railroad company from making a contract based upon its regularly filed and posted tariff; there is a law prohibiting it from making a contract based upon any other rate than that named in its regularly filed and posted tariff, and the only question to be determined in this case is whether or not the railroad company is responsible for its own negligence in failing to comply not only with the mandatory provision of a Federal Statute, but with every common law rule and obligation resting upon the railroad company to take such reasonable steps as might be necessary to acquaint its agents and the public generally with the rates at which freight would be transported over its lines.

In this case, therefore, we submit that it is immaterial whether or not this Court hold that the damage to the plaintiff was the result of the failure of the Railroad Company to comply with the Federal Statute regulating Interstate Commerce, or whether it was the result of its failure to exercise reasonable care in the conduct of its business in other respects. In either event the state court had jurisdiction of the question. We do not mean to say that the state courts have exclusive jurisdiction of this case, or that plaintiff in error is estopped from bringing the case to the Supreme Court of the United States, but we do say that under the particular facts of this case, the state court, having secured jurisdiction of the parties, has the same right to pass upon the questions involved in this case that the Federal Courts would have if the action had been brought in these courts.

Respectfully submitted,

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